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VOL. IX.

JANUARY TO DECEMBER, 1883.

der the Authority of the Governor-General in Council
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THE

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ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Wilson.

JUMMA DASS (DEFENDANT) *v.* ECKFORD (PLAINTIFF).

1882 *July* 11.

Principal and Agent—Power-of-Attorney—"Purchase, Sell, Endorse, and Transfer"—Meaning of "Power to Sell."

N. & Co., having a joint and several power-of-attorney from the plaintiff, authorizing them "to purchase, sell, endorse, and transfer for the plaintiff, and in the plaintiff's name and on the plaintiff's behalf," all shares standing in his name in the books of any public company or society, entered into a contract embodied in bought and sold notes, agreeing to sell by order and on account of *N. & Co.*, to the defendant, twenty-five Muir Mill Cotton shares, and agreeing to buy, by order and for account of *N. & Co.*, from the defendant, twenty-five Muir Mill Cotton shares in three months' time at an advanced rate; the bought and sold notes bearing the same date and being one transaction.

The transfer deeds were signed by a partner in the firm of *N. & Co.*, as attorney for the plaintiff, and *N. & Co.* received the purchase-money of the shares. Previous to the time fixed for the sale of twenty-five Muir Mill Cotton shares by the defendant to *N. & Co.*, the latter became insolvent. The plaintiff then brought a suit to recover the shares from the defendant.

Held by GARTH, C. J., that the transaction between *N. & Co.* and the defendant was not justified by the power-of-attorney, the contract not having been entered into "for and on behalf and in the name of the plaintiff" within the meaning of the power.

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That the transaction was either an actual loan, or a transaction in the nature of a loan, for the purpose of raising money.

Per WILSON, J., that the defendant took no title to the shares for two reasons, viz..—(i) because a power to sell is only a power to sell in the ordinary course of business,—*i. e.*, for a money price (ii) because it was the duty of the defendant, seeing that the shares were sold to him under a power, to see that he paid the price to the plaintiff or his attorney.

THIS was an appeal from a decision of WHITE, J.—

The plaintiff deposited with Messrs. Nicholls & Co., who were his agents, twenty-five shares in the Muir Mill Co., Limited, and gave to W. Nicholls and G. A. Thompson, two of the members of the firm of Nicholls & Co., a joint and several power-of-attorney, authorizing them (amongst other things) "for him and in his name, and on his behalf, to purchase, sell, endorse, assign, and transfer," amongst other properties, all shares standing in his name in the books of any public company or society.

On the 24th January 1881, G. A. Thompson entered into a contract with the defendant, embodied in certain bought and sold notes, agreeing to dispose of the twenty-five Muir Mill Cotton shares. The bought and sold notes ran as follows:

"Calcutta, January 24th, 1881.

Sold this day, by order and for account of Messrs. Nicholls & Co., to Jumma Dass Burmaidutt, twenty-five Muir Mill Cotton shares, at Rs. 200 per share.

Delivery and payment to-day.

Brokerage from seller, Rs. 2 per share.

(Signature of Broker.)

Calcutta, January 24th, 1881.

Bought this day, by order and for account of Nicholls & Co., from Jumma Dass Burmaidutt, twenty-five Muir Mill Cotton shares, at Rs. 205 per share.

Delivery and payment on the 25th March 1881.

(Signature of Broker)."

In pursuance of this contract, G. A. Thompson, professing to act as attorney of the plaintiff, transferred, under three transfer deeds executed by him in the name of the plaintiff, to the defend-

ant the twenty-five Muir Mill Cotton shares, and received the agreed price.

The defendant never attempted to register these shares in his own name until after the insolvency of Messrs. Nicholls & Co., which took place on the 8th February 1881, when it became evident to him that the repurchase of these shares by Nicholls & Co. could not be carried out.

The plaintiff brought this suit to recover from the defendant the twenty-five shares. The defendant contended that the power authorized Nicholls & Co. to do what they had done, and that the transaction was a sale. It appeared from the evidence of the broker who transacted the affair, given on behalf of the plaintiff, that his instructions from Nicholls & Co. were, not to sell the shares at the bazaar-rate, but to sell them and to buy them back; and that he did not mention a better price for the shares, because he had only authority to sell and buy back at the price mentioned, and had no authority to make an out-and-out sale; and also it appeared from the evidence of a former cash-keeper of Nicholls & Co., giving evidence on behalf of the plaintiff, that the transaction, on the receipt of the money from Jumma Dass, was entered in the cash-book of Nicholls & Co. under the head of "credit loan payable account."

Mr. *Phillips* and Mr. *Trevelyan* for the plaintiff.

Mr. *Bonnerjee* and Mr. *T. A. Apcar* for the defendant.

WHITE, J., was of opinion that the words "purchase, sell, endorse, assign, and transfer" should be read, on the authority of *The Bank of Bengal* v. *Fagan* (1), disjunctively; and that, on the authority of the case of *DéBouchout* v. *Goldsmid* (2), these words would not convey a power to pledge or mortgage the shares;—that, from the evidence of the broker who transacted the business, it was clear that he (the broker) had no authority to make an out-and-out sale, but had only authority to sell and buy back at the fixed prices which were settled between him and Thompson;—that, although from other evidence it was clear that the transfer deeds had all been executed in the name of the

(1) 5 Moore's I. A., 27. (2) 5 Ves., 211.

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plaintiff, yet there was no evidence to show that the defendant had agreed to buy, or that Thompson, as agent of the plaintiff, had agreed to sell, the shares to which the transfer deeds related. He further considered that the transaction partook much more of the character of a loan on the security of the shares, than of a *bonâ fide* sale of the shares; but declining to come to any finding on that point, rested his judgment upon the ground that the defendant had failed to show that Thompson had made any contract for the sale of the plaintiff's shares; it being a rule of law that an agent who seeks to bind his principal by a contract must make the contract in the name of the principal, and more especially where, as in the present case, the agent acts under a power-of-attorney which expressly directs that contracts connected with the power should be signed in the principal's name. He, therefore, decided the case in favor of the plaintiff.

The defendant appealed.

Mr. *Evans* (with him Mr. *T. A. Apcar*) for the appellant.—The questions are whether the transaction is a sale or a mortgage? if it is a mortgage, whether the power allowed a mortgage? or if it be a sale, whether the reasons given by the Court below will be sufficient, *viz.*, that Nicholls & Co. had power to sell, yet they had power only to sell the shares for and on behalf and in the name of Eckford, and that Nicholls & Co. had not followed out this power. The remarks made by the Court below on *DeBouchout* v. *Goldsmid* (1) are not correct; it was in that case decided that the words "sell, assign, and transfer" were to be read connectively and not disjunctively; whereas in *The Bank of Bengal* v. *Fagan* (2) it was held that the words were to be read disjunctively or else conjunctively in a strict sense. Of these two judgments, the judgment of the Privy Council must be followed. I, however, can satisfy the Court that the transaction here is a sale and not a mortgage, and therefore it will not be necessary to argue on the points raised in these cases. Now, could Nicholls & Co. have asked for re-delivery of the specific twenty-five shares on repayment? or if they had been sold, could we have had an action for them? As

(1) 5 Ves., 211. (2) 5 Moore's I. A., 27.

to whether the transaction is a sale or mortgage, the case of the *Yorkshire Railway and Wagon Co.* v. *Maclure* (1) strongly supports the view Mr. Justice White took of the case; but that case has been overruled, see Weekly Notes for 20th May 1882, p. 75, where it was held to be a transaction of sale and hire, adopted, because the loan could not be carried out. There is nothing in the evidence to show that the excess of Rs. 5, at which the re-sale was to be made, was to be taken as interest. We are not proceeding on a contract, but on a transfer-deed, and by that transfer-deed the property is in us. With regard to the evidence given by the broker as to what he thought was the meaning of the contract, it has been decided that it is not right to look at such evidence to find out the intention of the parties when the contract was made—*Fleming* v. *Koegler* (2). In *The Bank of Bengal* v. *Fayan* (3) the question was, did the property pass, and this is also the question in this case. If the property passed, nothing can take it out of the hands of a *bonâ fide* purchaser for value, and that takes us back to the question whether the power-of-attorney authorized what was done.

Mr. *Stokoe* (with him the *Officiating Advocate-General*, Mr. *Phillips*) for the respondent.

The judgments of the Court (GARTH, C.J., and WILSON, J.) were as follows:

GARTH, C. J.—The questions which have been raised on appeal, and which we have to determine, are: 1*st*, whether the transaction entered into between Messrs. Nicholls & Co. and the defendant was of such a nature as was justified by the power-of-attorney? and 2*ndly*, whether it was entered into for and on behalf, and in the name of, Major Eckford within the meaning of the power?

I think that both these questions should be answered in the negative.

It seems to me that the transaction in its nature was neither a sale nor purchase of the shares in question. It was either

(1) L. R., 19 Ch. D, 478. (2) I. L. R., 4 Calc., 245.
(3) 5 Moore's I. A., 27.

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an actual loan, or a transaction in the nature of a loan, for the purpose of raising money.

This appears, I think, very clearly from the evidence of Ramrutton Danye, the broker, who acted for Messrs. Nicholls on the one hand, and of Daidraj Argurwallah, the gomashta of the defendant, on the other. Ramrutton, although necessarily called by the plaintiff, was by no means a favourable witness to him. His object evidently was, and naturally would be, to make out that the transaction was one which Nicholls & Co. had a right under the power-of-attorney to carry out for the plaintiff. He was himself the broker employed by Nicholls & Co., and had seen the power-of-attorney before he entered upon the transaction. He says that, on several previous occasions he had obtained advances of money for the plaintiff upon transactions very similar to the present one; and it is probable that the form in which this transaction was carried out was only somewhat different from those which preceded it, in consequence of Ramrutton having observed that the power-of-attorney did not authorize a loan.

Ramrutton and Daidraj both say, that the sale and purchase of the shares was intended to be one transaction. Ramrutton expressly says, that whatever the defendant might have offered him for the shares, he had no authority to sell them, except upon the terms of re-purchase. He had no authority, he says, to make an out-and-out sale. And it is obvious, on looking closely into the transaction, that this must have been so. The defendant was not a dealer in shares. He was simply a money-lender, and was only in the habit of taking shares by way of security. He knew nothing, nor did Daidraj, of the value of these shares, and he evidently took the statement of their value from Ramrutton, with reference, not to their price in the market, but to the sum which he was to receive on the re-purchase.

The price in the market, so far as we can judge from the evidence, was Rs. 250 or thereabouts,—certainly not less than that sum; and it is not likely, under these circumstances, that Ramrutton would have sold the shares to the defendant at Rs. 200, except upon the terms of re-purchase; or that the defendant

would have sold them back again, unless he had been obliged to do so, at Rs. 205. The additional price of 5 rupees upon the re-purchase exactly represented interest at 15 per cent. per annum. I think it clear, therefore, that the transaction was not a *bonâ fide* sale or purchase, properly so called, but merely a device by Nicholls & Co. to obtain a temporary advance of money by a so-called sale and re-purchase.

I confess, I strongly suspect, from the evidence of Daidraj and Bhimraj, that the transaction was not entered in their books in the same way as previous transactions, because they had been informed by Ramrutton that, for some reason or other, the transaction was not to be called a loan; and it is admitted that this was the first purchase which the defendant has ever made.

The defendant himself dared not present himself in the witness box, and I strongly suspect, that he or his gomashtas knew more about the fraud that was being practised upon the plaintiff than could be extracted from them in cross-examination.

Taking the transaction, however, as it is represented by the witnesses on either side, I consider that it was certainly not a sale or purchase or transfer of shares within the meaning of the power-of-attorney.

Thus far I have assumed that the transaction was one entered into for and on behalf of the plaintiff. But the next question which we have to determine should also be answered, in my opinion, against the defendant. It was upon this point that Mr. Justice White decided the case in the Court below. He considered that whatever the real nature of the transaction was, it was not authorized by the power-of-attorney, because it was not carried out for or on behalf or in the name of the plaintiff.

It is clear from the evidence on both sides, that, at the time when the bargain was made, the name of the plaintiff was never mentioned, and the defendant's own case is, and his witnesses say distinctly, that they never knew the plaintiff in the transaction. From beginning to end they considered they were dealing with Nicholls & Co., and although they received the transfers, they did not look at them, and they were never aware, until after the insolvency, that the plaintiff's name appeared

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on the transfers. So far, therefore, as the defence was concerned, it is clear that the bargain was not made with the plaintiff; and it is equally clear that, so far as the partners of Nicholls were concerned, they were dealing for themselves and for their own benefit, and not for that of the plaintiff.

The transaction was carried out by bought and sold notes, which are as follows:—(reads bought and sold notes).

Now it is an admitted fact in the case, that the firm of Nicholls consisted of four persons, Mr. Thompson and Mr. Nicholls to whom the power-of-attorney was given, and Mr. Locke and Mr. Hawes who had nothing to do with it; and therefore the contract was made with the defendant by four persons to whom the plaintiff had given no power-of-attorney, and whom he had not authorized to make any such bargain.

So far as I can see, if the plaintiff had chanced to hear of the transaction, and had applied to the defendant to re-sell to him the shares at Rs. 205 per share, on the day when the resale was to take place, the defendant might have refused to make the re-transfer upon the ground that the bargain was not made for the plaintiff or by his authority; and on the other hand, if the defendant had applied to the plaintiff to re-purchase at Rs. 205, he would have had no power to compel the re-purchase.

It is true, that the transfers of the shares were in the plaintiff's name, but those transfers were made in a transaction which was clearly unauthorized by the power, and which was not made for or on behalf or in the name of the plaintiff.

One very fair test, as it seems to me, whether the plaintiff ought to be bound by the transaction, is this. If the defendant had looked at the transfers, as he ought to have done, and had seen that they were transfers made of the Muir shares and on the plaintiff's behalf, and if he had then asked to see the power-of-attorney, ought he not, and should he not, at once as a reasonable man have seen, on looking at the power, that the transaction into which he was entering was one which the power-of-attorney did not warrant.

I think that this appeal should be dismissed with costs on scale 2.

WILSON, J.—I agree in the conclusion at which the Chief Justice has arrived. I have had the advantage of seeing his judgment, but I prefer to rest my own decision upon somewhat narrower grounds than those relied upon in that judgment.

The plaintiff gave to two members of the firm of Nicholls & Co. a joint and several power-of-attorney, authorizing them, amongst other things, "for me, and in my name, and on my behalf, to purchase, sell, assign, and transfer shares in any public company." The firm of Nicholls & Co. consisted of four parties.

The attorneys or one of them, or Nicholls & Co., entered into a contract with the defendant, in the name of Nicholls & Co., embodied in bought and sold notes, whereby Nicholls & Co. agreed to sell to the defendant a certain number of shares in a company at a named price, and the defendant agreed to sell back a like number of shares in the same company at a future day to Nicholls & Co., at a enhanced price, the whole transaction being one transaction. In pursuance of this contract, one of the attorneys, professing to act as attorney, transferred the shares of the plaintiff to the defendant and received the agreed price.

I think the defendant took no title to the shares for two reasons.

First.—A power to sell is, I think, only a power to sell in the ordinary course of business,—that is to say, for a money-price. But the sale here was partly for a money-price and partly in consideration of the sale of like shares at a future day. On this ground, I think, the transaction was not within the power.

Secondly.—Assuming that, after a contract had been made between Nicholls & Co. and the defendant, for the sale of shares, the plaintiff's attorneys might properly sell his shares in satisfaction of that contract (and if there were no other objection in the way I am inclined to think they might), still it was the duty of the defendant, when he found that the shares sold to him were the plaintiff's shares and were transferred only under a power-of-attorney executed by him, to see that he paid the price to the plaintiff or his attorneys. But the price consisted in part of money, in part of a contract

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to re-sell similar shares, and that contract was not with the plaintiff nor with his attorneys, but with Nicholls & Co. It was, therefore, a contract of which the plaintiff could not, so far as I can see, claim the benefit in any way.

Appeal dismissed.

Attorney for the appellant: Mr. *Pittar*.

Attorneys for the respondent: Messrs. *Sanderson & Co.*

APPELLATE CIVIL.

Before Mr. Justice Cunningham and Mr. Justice Tottenham.

1882 *May 5.*

SREEPUTTY MIRDHA AND ANOTHER (DEFENDANTS) *v.* KARTICK SINGHA (PLAINTIFF).*

Attachment—Execution of Decree—Intervenor—Claim to Attached Property—Cause of Action—Civil Procedure Code (Act VIII of 1859), ss. 246, 247.

Where a person whose property has been attached in execution of a decree against another person, and whose claim under s. 246 of Act VIII of 1859 has been rejected, brings a suit under the provisions of s. 247 of Act VIII 1859, it is no objection to that suit that, previously to the filing thereof, the decree (in execution of which the property had been attached) was satisfied by the judgment-debtor and the property released from attachment.

THE judgment of the Court below, as far as is material for the purposes of this report, is as follows:—

"The only question to be tried in this case is, whether there was a cause of action for this suit, and the lower Court should have allowed the plaintiff a trial on the merits.

"It appears that, in execution of a decree by the defendant No. 1 against the other defendants, the tank in dispute was attached and advertised for sale. The plaintiff intervened with a claim, and objected to its sale, on the ground that the tank was his own property and in his possession. The claim was not enquired into, but was disallowed under s. 247, Act VIII of 1859. In fact, the petition of claim was

Appeal from Appellate Decree, No. 419 of 1881, against the decree of Baboo Kadar Nath Mozoomdar, Second Subordinate Judge of Midnapore, dated the 12th November 1880, reversing the decree of Baboo Brojobehary Shome, Munsif of Ghatal, dated the 31st March 1879.

not admitted by reason of its untimely presentation. The plaintiff, therefore, sued in the present case to establish his title to the tank and to have it released from attachment.

"It transpired subsequently that the sale of the property did not take place; it was virtually released from attachment in consequence of the judgment-debt being satisfied by the sale of other properties of the judgment-debtors, and so, at the time of the institution of the suit, which was after the execution-proceedings had come to an end, the attachment was not in existence; and the plaintiff's prayer for release of the property, which has ever since remained in his possession, was perfectly without a cause, and the lower Court's order, disallowing that portion of the claim, was quite justifiable. But the lower Court declined to try the merits of the case, on the ground that plaintiff had no cause of action for the suit, and that decision has been made the subject of this appeal.

"The plaintiff's petition of claim was disallowed under s. 247 of Act VIII of 1859, and the latter portion of that section (which says 'the order disallowing the investigation shall not be subject to appeal, but the claimant shall be left to prosecute his claim by a regular suit') clearly gave him a right of suit. The lower Court has said that 'that provision is not imperative, but permissive.' But, if 'permissive,' it permitted the plaintiff to institute a regular suit. The section does not say that no such suit shall lie unless the property is sold, and hence the first Court's opinion that such was the intention of the law was quite unsupported. It seems to have been under the impression that a decision under s. 246, adverse to the plaintiff, would have given him a cause of action, and that a rejection of his petition under s. 247, not followed by the sale of his property, could not give him such cause. But s. 247, as I have said above, has made no such restriction on the right of suit. Suppose the plaintiff had instituted this suit immediately after his petition was rejected, and before the execution-proceedings were terminated, could it be contended in that case that he had no right of suit when the law expressly gave it to him? I think no such contention could be allowed. Then, suppose that the execution-proceedings were put an end to, and the property released before the suit would have been decided, would the suit stop and fail because the attachment was removed? I believe the suit would not fail on that account. It seems, therefore, quite clear to me that a suit under s 247 would lie independent of the sale of the property attached. It is quite possible to imagine a case in which

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the execution-proceedings might be delayed over a considerable period, and the suit disposed of in the meantime. If a suit instituted before the release of the property would lie, I see no reason why it should be disallowed by reason of the decree-holder not bringing the property to sale, and causing it to be released at his own choice. The section of the law gave the plaintiff a right of action in unlimited terms, and the restrictions imposed on it by the lower Court have not been supported by any provision of law I am aware of. I, therefore, cannot agree with the lower Court in thinking that the plaintiff had no cause for this suit. That Court applied the principles of declaratory decrees provided for by s. 15 of the Act to this suit, but this case was not instituted under that section. Had it been so, it would have been of a quite different nature, and the principles laid down in the rulings quoted by the Court below, as well as in many others, should have been applied to it. But as it was a suit under s. 247 of the Act, those rulings could not be applicable. Questions of injury or inconvenience resulting from the attachment have not been made necessary to be considered in cases under this section, and in my opinion, sale of the attached property would not be indispensable to give a cause of action under it. Even if the question of injury or inconvenience were to be considered in this case, the attachment of plaintiff's property by declaring it to belong to others has been injurious to his rights, for though the injury has not been immediate, a path was paved for future difficulties. The property was attached and advertised for sale as belonging to the judgment-debtors, those proceedings must have been known to the people at large, and if on any future occasion the plaintiff would be under any necessity of entering into a bargain regarding the property, the probability is ten to one that desirable or successful terms could not be secured. In this way the attachment of his property, though not followed by its sale, has been prejudicial to his rights, and a declaration of his indisputable title was, therefore, necessary to be obtained. For these reasons I hold that the plaintiff's suit was legally maintainable, and a trial on its merits must be held. As there is no evidence in the records, and the lower Court dismissed the suit on a preliminary point,—*viz.*, want of cause of action,—which this Court must overrule, the case should be sent back to the Court below for trial on the merits."

On remand a decree was given in favour of the plaintiff, which was affirmed on appeal. The defendants appealed to the High Court.

Baboo *Jadub Chunder Seal* for the appellants.

Baboo *Ashutosh Dhur* and Baboo *Bama Churn Banerjee* for the respondent.

The judgment of the Court (CUNNINGHAM and TOTTENHAM, JJ.) was delivered by

CUNNINGHAM, J.—In this case the property of the plaintiff having been attached by the defendants, the plaintiff brought his claim under s. 246 of the old Code. That claim having been rejected without investigation, on the ground of the late date on which it was put in, plaintiff was left to prosecute his claim by a regular suit under s. 247. He has done so, and, after a contest on the part both of the judgment-debtor and the attaching-creditor, has established his right to the property in suit. But an objection is taken to the decree, which was also taken to the suit, on the ground that, at the time when the plaintiff made his claim, the attachment had virtually ceased owing to the decree having been satisfied from other properties of the judgment-debtor.

We concur with the Court below in thinking that there is nothing in this circumstance to deprive the plaintiff of the remedy which the law provided for him. A very distinct shade of doubt would be thrown on his title by the attachment, and the seriousness of the evil is shown by the fact that the plaintiff's title has been earnestly contested by both the other parties to the suit. We think, therefore, that the plaintiff was entitled to sue.

The appeal is dismissed with costs.

Appeal dismissed.

ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Cunningham.

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July 12.

IN THE MATTER OF THE INDIAN COMPANIES' ACT OF 1866 AND OF THE MEDLA TEA CO., LIMITED.

C. KERNOT, CLAIMANT, *v.* WALTON, OFFICIAL LIQUIDATOR.

Company—Articles of Association—Power to borrow—Borrowing in excess of Power in Articles of Association—Ratification.

Under the articles of association of a limited company, the directors had power, from time to time as they might see fit, without any previous consent of the shareholders, to borrow any sum of money not exceeding Rs. 50,000, on the bill, bond, note, or other security of the company, upon such terms as they might think proper; and had power, with the sanction of a special resolution of the company previously obtained at a general meeting, to borrow any sum of money not exceeding in the whole, together with the Rs. 50,000, the sum of Rs. 1,00,000.

K. advanced sums of money to the company amounting in 1879 to over Rs. 80,000. No previous sanction was given to any of these advances. On the 4th October 1879, an extraordinary general meeting of shareholders was held, at which a resolution was passed sanctioning a mortgage to *K.* of the whole of company's property, except a certain garden, to secure the payment of a sum, not exceeding Rs. 1,00,000, for advances already made and to be made, with interest at 7 per cent. This resolution was confirmed on the 16th of October, and the mortgage was executed on the 22nd of December 1879. Subsequently the company was ordered to be wound up, and *K.* advanced a claim for Rs. 1,20,787.

Held, that there is a distinction between loans which a company is empowered to raise under its borrowing powers, and debts which, in meeting its current liabilities and in the actual carrying on of its affairs, the company, or its agents on its behalf, have contracted; and that the advances made by *K.* did not amount to a borrowing within the meaning of the articles of association.

In re Cefn. Cilcen Mining Company (1) and *Waterlow* v. *Sharp* (2) followed.

Held also, that the borrowing powers conferred by the articles of association justified a mortgage, the object of which was in part to cover previously incurred liabilities.

APPEAL from a judgment of WILSON, J.

This was a claim made by Dr. Kernot against the Medla Tea Company, Limited, for Rs. 1,20,787-11. The principal questions at the hearing were—(i) as to the validity of the debt, and (ii) as to the validity of the security.

The facts were as follows:

The Medla Tea Company, Limited, was formed on the 11th

(1) L. R., 7 Eq., 88. (2) L. R., 8 Eq., 501.

of January 1875, and by art. 13 of the Company's articles of association the Directors had power, from time to time as they might see fit, without any previous consent of the shareholders, to borrow any sum of money not exceeding Rs. 50,000, on the bill, bond, note, or other security of the Company, at such rate of interest and upon such terms as they might think proper; and further the Directors had power, with the sanction of a special resolution of the Company previously obtained at a general meeting, to borrow any sum of money not exceeding in the whole, together with the 50,000 rupees, the sum of Rs. 1,00,000.

Up to the end of the season of 1877, the Company was financed by Messrs. Thomas and Co., after which time they refused to finance the Company further. On the 4th of January 1878, a general meeting of the Company was held, at which the Directors were authorized to arrange for the further financing of the Company. On the 14th of January 1878, Dr. Kernot was made a Director, and he agreed to finance the Company, and advanced to the Company a sum of Rs. 30,000, which went to pay off the advances made by Thomas and Co. On the 13th of February 1878, the money advanced to the Company by Dr. Kernot amounted to Rs. 63,569-9-8, and this fact became known to the shareholders when the reports and accounts were issued to the shareholders at the end of 1878.

On the 10th of April 1879, at a general meeting of the shareholders, there were present six shareholders: Dr. Kernot, in the chair, held proxies for two shareholders, and four others; when the report and accounts were approved and passed, and a resolution carried, empowering the Directors, in addition to the sum of Rs. 50,000 mentioned in the 12th article of the memorandum of association, to borrow a further sum of Rs. 50,000 on such terms as they might think fit, making in the aggregate a sum of Rs. 1,00,000, for the purpose of the Company. This resolution was, however, never confirmed.

Dr. Kernot continued to finance the Company, and on the 20th of June 1879 the Company owed him the sum of Rs. 80,000.

On the 4th of October 1879, an extraordinary general meeting

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of the shareholders was held, at which a resolution was passed sanctioning a mortgage to Dr. Kernot of the whole of the Company's properties other than the "Maskowah Garden," to secure payment of a sum not exceeding Rs. 1,00,000 for advances already made and to be made, with interest thereon at 7 per cent. per annum. At this meeting Dr. Kernot was present, and represented one out of six others of his co-sharers present.

This resolution was confirmed on the 16th of October 1879, Dr. Kernot representing one of the seven other shareholders present at the meeting. Due notice of these two meetings had been given to the shareholders by circular and advertisement in the public papers.

On the 8th of November 1879, Dr. Kernot retired from the Directorship, and on the 18th December 1879 the debt due to him amounted to Rs. 87,353.

On the 22nd of December 1879, the Directors (there being only three Directors on the Board at the time) executed a mortgage of the Company's properties in favor of Dr. Kernot, and the rate of interest, which was formerly 10 per cent. on his advances, was, under the mortgage deed, lowered to 7 per cent.

On the 10th of January 1880, at a general meeting of the shareholders, Dr. Kernot was asked to rejoin the Board of Directors, and he consented to do so.

On the 13th of March 1880, at an ordinary general meeting of the shareholders, accounts up to the 31st December 1879 were passed.

On the 13th of July 1880, Dr. Kernot, through his attorney, served a notice on the Company, calling on them to repay to him the moneys advanced, within seven days, and demanding possession of the properties mortgaged to him.

On the 20th of July 1880, Dr. Kernot took possession under his mortgage, and the Company went into liquidation, one W. M. Walton being appointed Official Liquidator to the Company. Dr. Kernot then put in his claim, stating that, up to the 31st of May 1881, the sum of Rs. 1,20,787-11 was due to him for moneys advanced for the cultivation and production of tea at the garden mortgaged to him. It appeared from the books of the Company, that a shareholder named Campbell had objected

to Dr. Kernot financing the Company, to the borrowing of money for the use of the Company, and to the mortgage; but being always in the minority, his objections were, at the several meetings, overruled.

The Official Liquidator opposed the claim on the grounds:—(i) that the advances made by Dr. Kernot prior to the execution of his mortgage, in excess of Rs. 50,000, should be disallowed as not being a debt for which the Company was liable, the Directors having acted *ultrâ vires* with regard to their borrowing powers; (ii) that the mortgage being a mortgage of lands in the mofussil, Dr. Kernot's possession on default of payment was illegal, his remedy being to institute a regular suit, and having obtained a decree, to proceed in execution to sell the property; (iii) that the Company had given to Dr. Kernot a fraudulent preference, and that the mortgage was, therefore, invalid, and should be set aside.

Mr. *Branson* and Mr. *Bonnerjee* for Dr. Kernot.

Mr. *Jackson* and Mr. *T. A. Apcar* for the Official Liquidator.

WILSON, J., in giving judgment, held: That the transactions of the Company, if valid, were valid on the ground of being within the scope of the authority of the Directors, or on the ground of subsequent ratification. That the principles of law applicable to the latter ground showed—(i) that any act in excess of the memorandum of association is wholly invalid, and can never be ratified—*Ashbury Railway Company* v. *Riche* (1); (ii) that an act of the Directors, *ultrâ vires* of the Directors under the articles of association, but not beyond the powers of a majority as restricted by the articles of association, stands on a different footing, and that such an act can be ratified by a meeting of shareholders duly called—*Irvine* v. *The Union Bank of Australia* (2)—(which was a case decided on the construction of an Act of the Colony of Victoria, an Act similar to the Act in force in India); (iii) that if the articles of association restrict the powers not only of the Directors,

(1) L. R., 7 H. L., 653.

(2) L. R., 2 App. Cas., 375; S. C., I L. R., 3 Calc., 260.

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but of the majority of the shareholders, and those restrictions have not been observed, so that the act done is outside the articles of association altogether, and *ultrâ vires* not only of the Directors, but of the meeting which has done or sanctioned it, the act, provided it be within the scope of the memorandum, may be ratified, but the ratification must be that of the whole body of the shareholders—*The Phosphate Company* v. *Green* (1). That it was under the last head that the present case fell, and that the acts of the Directors were beyond the powers of the Directors and beyond the powers of a majority, because in dealing with the question of borrowing, art. 13 of the articles of association imposed two restrictions on borrowing, *viz.*, that it must be with the sanction of a special resolution previously given at a general meeting, and this expressly precluded a subsequent ratification by any majority of shareholders. That, therefore, so far as the borrowing in the present case was in excess, it could only be ratified by the whole body of shareholders, which, in the case of *The Phosphate Company* v. *Green* (1), was held to have been given by the tacit acquiescence of the shareholders, who had had full knowledge and opportunity to object. That, at the end of 1878, the Company had borrowed in excess of the borrowing powers Rs. 13,000, and that the resolution of the 13th of April not being a special resolution, the validity of the borrowing under it must depend on ratification. That although, in March 1880, the report and accounts were circulated to the shareholders, which, in April 1880, were adopted, yet there was clear evidence that Campbell, one of the shareholders, had dissented throughout from the whole of the transactions, and that it could not be assumed that he ever had intended to ratify any of the transactions which were done irregularly, and that the absence of assent by him was as sufficient as the objection of all.

He, therefore, found that the excess of borrowing beyond the powers defined in the articles of association was not good in the first instance, and had never been effectually ratified as to

(1) L. R., 7 C. P., 43

all sums borrowed within the 50,000 rupees limit; but that as to all sums borrowed under the mortgage within the Rs. 1,00,000 limit, with all interest, the loan was valid.

That, as to the other points raised, no fraudulent preference had been made out, nor did the question as to the proceedings on the mortgage arise, inasmuch as it was not proposed to act on the power of sale.

From this decision Dr. Kernot appealed.

Mr. *Branson* (with him Mr. *Bonnerjee*) for the appellant.—Inasmuch as, at a meeting of shareholders, the resolution was passed, is it not enough that the majority of the shareholders agreed? The matter is concluded by the case of *Irvine* v. *The Union Bank of Australia* (1). In that case the advance was sanctioned at a general meeting by a majority of the shareholders present; it was found that the Directors had borrowed in excess of their powers, without their powers of borrowing being extended; and it was held that the shareholders could acquiesce in the borrowing, and had done so at an extraordinary meeting by a resolution of the majority of the shareholders present at the meeting. If Dr. Kernot, even without a mortgage, had come forward to save the property from ruin, if on no other ground (though a salvage claim might be advanced), he would be entitled to recover his advances, for he was a trustee on behalf of the shareholders; see *Lowndes* v. *Garnett Mining Company* (2). As to costs, they have all been occasioned by the contention of the other side, setting up a charge of fraudulent preference, and this point was decided in our favour.

The Court here called on the *Officiating Advocate-General* (Mr. *Phillips*), who appeared for the Official Liquidator.

The *Officiating Advocate-General.*—The Privy Council case can be distinguished from this case; but we say also that Dr. Kernot being a Director, and the borrowing being improper, he cannot take advantage of the presumption that every thing was rightly carried out, which presumption out

(1) L. R., 2 P. C., 366; S. C., I. L. R., 3 Calc., 280.
(2) 33 L. J., Ch., 418.

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siders dealing with a Company are usually entitled to make. As to the Privy Council case cited by the other side, the Company there had power to borrow money, with no limit to their borrowing powers; but the Directors had no such power, and that is the distinction between the two cases, for in the present case the Company had a limited power of borrowing, *viz.*, up to one lac, under the articles of association. In the Privy Council case they had power to extend their borrowing powers without altering their articles of association. Mr. Branson has endeavoured to show that there is no distinction between altering the articles and waiving any informality that may have taken place. *Ashbury Railway Company* v. *Riche* (1) decides, that a contract, being of a nature not included in the memorandum of association, is *ultrâ vires* not only of the Directors but of the whole Company, so that even the subsequent assent of the whole body of shareholders would have no power to ratify it. I submit that there must be a notice to the effect that the Directors had exceeded their powers, and that the meeting is convened to ratify the acts done; this was not done here. It is not enough to show that Campbell did not dissent; they must show that he assented. In *Irvine* v. *The Union Bank of Australia* (2) no decision was come to on the passage cited by the other side, for nothing was allowed beyond the half of what was claimed. There was no decision except so far as a dictum of the Privy Council can be held to be so, because they held no ratification had taken place. If the act is beyond the power of the Directors, the whole body of shareholders must ratify it. An agent has no power to ratify, and the same rule applies to Directors. As to what ratification, what knowledge, or notice, is required, see s. 198 of the Contract Act, and also the remarks of Sir W. Page Wood as to acquiescence in *In re Athenæum Society, ex parte Eagle Co.* (3), and in *In re Phœnix Life Assurance Co. Burges' case* (4), and *Spackman* v. *Evans* (5); also *Houldsworth* v. *Evans* (6).

(1) L. R., 7 H. L., 653.

(2) L. R., 2 P. C., 366; S. C., I. L. R., 3 Calc., 280, at 287.

(3) 4 K. & J., 563.

(4) 2 J. & H., 446.

(5) L. R., 3 Eng. & Ir. App., 190-194.

(6) L. R., 3 Eng. & Ir. App., 263-276-277.

[GARTH, C. J.—If it is a question of ratification by conduct, the ratification must be by all the shareholders; if a question of ratification at a meeting, it must be a ratification by a majority of the shareholders.] As to the point that the money having been received the Company are bound to repay it, it is too late to show that they have relieved the Company from liabilities. The principle laid down in *In the matter of the Indian Companies' Act of* 1866 *and of the Port Canning Company* (1), cannot, on appeal, be, for the first time, applied to this case; and before doing so, it is necessary that the liability should have been paid off. As regards s. 65 of the Contract Act, I say that a Limited Company is not 'a person' within the meaning of the section.

Mr. *Branson* in reply.—If the loan account does not include borrowing, then I stand in a better position, as I am a Director who, seeing that money was wanted, financed the Company to get the garden out of difficulties. As to a borrowing by Directors, see Thring on Joint Stock Companies, p. 83. This Company being a trading company, it would have a power to borrow and to give a mortgage as security for its debts. As to whether I am entitled to interest I cite *In re The German Mining Company* (2) and *In re The British Provident Assurance Company, Lane's case* (3). As to whether the shareholders had sufficient information and notice of the matter when the ratification took place, the series of cases which follow *In re The German Mining Company* (2) cited in the last edition of Lindley on Partnership, pp. 760, 761,—*viz.*, *In re The Norwich Yarn Company* (4), *Baker's case* (5), *Troup's case* (6), *Hoare's case* (7),—show that where the Directors of a company, acting *bonâ fide* and to the best of their judgment, advance money in order to carry on the business of the company, and spend the money for that purpose, they are

(1) 7 B. L. R., 601.
(2) 4 De G. M. & N., 19.
(3) 1 De Gex. J. & S., 504, 513.
(4) 22 Beav., 143.
(5) 1 Dr. & Sm., 55.
(6) 29 Beav., 353.
(7) 30 Beav., 225.

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entitled to be reimbursed by the company. If this is a borrowing within the strict meaning of the word, a borrowing, such as the Directors had no power to make without the sanction of the shareholders previously obtained, it has been sufficiently ratified by the shareholders, for they ratified on the 4th and 16th October 1879, and on the 12th March 1880. They had knowledge of the matter in October 1878, for the report read then stated that Rs. 63,000 was due by the Company, and this, in *In re The Norwich Yarn Company* (1), was held to be sufficient notice. [CUNNINGHAM, J.—Your affidavits clearly show that Mr. Campbell knew what was going on, so are not these cases, which go to show what is to be considered knowledge or notice, unnecessary?] *In re The British Provident Assurance Company, Lane's case* (2) goes further than the case of *In re The Norwich Yarn Company* (1); it shows that all the shareholders, both absent and present, are bound. Now, at the meeting of the 10th April, power was given to the Directors to extend their borrowing; it was a general meeting of the shareholders, therefore Campbell knew that the Directors had been allowed to borrow Rs. 50,000 more. This resolution, it is true, was not confirmed, so I can only use this fact as evidence that Campbell knew what was going on. If the act of the Directors was not ratified, then I say the onus is on the party who denies it to come and show it was a bad transaction, and that the contract is *ultrâ vires*—Pollock on Contracts, p. 104. As to the point that there is in every company a power incidental to its existence to incur debts, see *Brice* on *Ultrâ Vires*, pp. 245, 247. There is a distinction between loans which a company is empowered to raise under its borrowing powers and debts for current liabilities incurred by the company; see *Waterlow* v. *Sharp* (3), *In re Cefn. Cilcen Mining Company* (4).

The *Officiating Advocate-General* (Mr. *Phillips*) was allowed to address the Court on the new cases cited, and on points on which he had not addressed the Court before.

(1) 22 Beav., 164-165.
(2) 1 De Gex J & S., 504, 513
(3) L. R., 8 Eq., 501
(4) L. R., 7 Eq., 88

The case *In re The British Provident Assurance Company* (1) is the case of an outsider, and Mr. Thring, in his book on Joint Stock Companies, pp. 83 and 90, points out this difference. *In re The Norwich Yarn Company* (2) was decided before limited liability companies came into existence. *South Durham Iron Company, Smith's case* (3), is as to whether Directors can shield themselves behind their own breach of duty; but they must stand in a fiduciary position to their shareholders. As to the case of *In re The German Mining Company* (4), the Company was established under a deed of settlement, and afterwards was registered under the Limited Liabilities Act, and the loans were all made before the registration of the Company. *In re Cefn. Cilcen Mining Company* (5), where two Directors incurred certain obligations to benefit the Company, and the obligations there were held not to be a borrowing, and supposing it to be a borrowing, it was not unauthorized. If the payments by Kernot are advances and not loans, then I must endeavour to show that Kernot had no right to recover, because if the Directors could not recover, Kernot, who was also a director, could not do so either. As to the extent of affirmative powers in memorandums of association, see *North Stafford Steel Company* v. *Ward* (6).

The judgment of the Court (GARTH, C. J., and CUNNINGHAM, J.,) was delivered by

GARTH, C. J.—The question raised in this appeal is, whether Dr. Kernot is entitled to any larger portion of his claim against the Medla Tea Company than has been allowed by the Court below, and to enforce that claim under a mortgage of the 22nd of December 1879, executed in his favour by three of the Directors of the Company in accordance with a special resolution passed on the 4th of October 1879, at an extraordinary general meeting, and confirmed on the 16th of October 1879.

(1) 1 De Gex. G. & S., 504, 513.
(2) 22 Beav., 143.
(3) L. R., 11 Ch. D., 379.
(4) 4 De G M. & N., 19.
(5) L. R., 7 Eq., 88
(6) L. R., 3 Ex., 172.

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The mortgage recites that the Medla Tea Company, being in want of funds for and towards enabling them to work and carry on the tea gardens, Dr. Kernot had advanced various sums of money, and had received from and on their account various sums of money, leaving a sum of Rs. 87,353, including interest up to date, due to him; "that they had asked Dr. Kernot to lend and advance from time to time such further sums as might be necessary for carrying on the gardens; that the mortgagee had consented on the express understanding that the loan and interest should never exceed one lac; and that it was agreed that the mortgage should be security for all such sums as Kernot had paid, laid out, advanced, or expended, or might from time to time pay, lay out, advance or expend, or engage so to do or otherwise become liable for, on account, or on credit of the Company. The mortgage then follows in these terms, with the provision that the sum due to Kernot should not at any time exceed one lac with interest. There is a covenant for repayment seven days after demand, a covenant to pay forthwith all law charges between attorney and client incidental to this mortgage security or to any proceedings which may be had either for sale, or attempted sale, or otherwise, of the mortgaged premises for procuring or obtaining payment of any moneys thereby received. The rate of interest is 7 per cent with annual rests. There is power to enter and take possession on default and carry on; money advanced while so carrying on to be deemed advanced to the Company. Usual covenants, &c.

The mortgage was sealed and signed by three Directors—Hart, Longmuir, and Barlow.

In July 1880 Kernot demanded payment within seven days, or, in default, possession of the mortgaged premises; and on the 28th of July took possession under the mortgage.

In December 1880 the Company went into liquidation, and Dr. Kernot advanced a claim for Rs. 1,20,787. In disposing of this claim the original Court (17th September 1881) declared him entitled to charge the Company (i) with advances made before the 16th of October 1879, but so that the whole of the principal due in respect of such advances should not, at any time prior to the 16th of October 1879, exceed Rs. 50,000; (ii) with

advances subsequent to the 16th of October 1879, but so that the whole of the principal of such further advances should not, together with advances prior to the 16th of October 1879, exceed one lac; and ordered that the claim, as thus defined, should be allowed with interest at 10 per cent. to the 16th of October 1879, and thereafter at 7 per cent. on the aggregate amount; and that the rest of the claim be disallowed. If necessary, an account of sums laid out by Kernot in managing, &c., was to be taken, and the Liquidator was to retain his costs,—claimant to bear his own costs.

From this order the claimant appeals on the following grounds:—

1*st.*—That he was entitled to charge the Company in respect of advances made prior to the 16th of October 1879, not only to the extent of Rs. 50,000, principal, but to the entire extent of his advances;

2*nd.*—That he was entitled to charge the Company in respect of advances made subsequent to the 16th of October 1879, not only to the extent of Rs. 1,00,000, principal, inclusive of prior advances, but to the full extent of his advances;

3*rd.*—That the Company did not exceed their powers in borrowing beyond Rs. 50,000;

4*th.*—That there was a ratification of the loans in excess of Rs. 50,000;

5*th.*—That interest up to the 16th of October 1879 ought to have been allowed at the rate claimed;

6*th.*—That the claimant was ordered to pay his own costs;

7*th.*—That no part of the claim should have been disallowed.

There is no dispute as to the regularity of the proceedings of the 4th and 16th of October 1879, at which the mortgage was sanctioned, or as to the due execution of the mortgage itself, or as to the meeting of the 13th of March 1880. The only questions are: (i) How far the sum which the mortgage purported to secure, and which is now claimed by Dr. Kernot, is legally due to him from the Company? and (ii) How far the Directors had power to mortgage the property of the Company to secure the sum, whatever it may be, due to Dr. Kernot?

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For the purpose of determining these questions it is material to premise the following facts:—

The Company was registered in 1875. Its nominal capital was one and-a-half lacs, in 1,500 shares of Rs. 100 each. The objects of the Company are stated in the memorandum of association to be the purchase of certain tea estates, the manufacture and sale of tea, the leasing of the estates, and "the doing of all other such things as are incidental or conducive to the attainment of the above objects." Part of the estates purchased were bought from Mr. A. S. Campbell for Rs. 60,000, paid as agreed. Another portion was also bought from Mr. Campbell for Rs. 40,000 made up as follows:—

Paid on Mr. Campbell's P. N. to the holder	...	11,000
240 paid-up shares in Campbell's name	...	24,000
50 paid-up shares to Barlow, at Campbell's request		5,000
		40,000

The 60,000 and 11,000 were contributed by Messrs. J. Kingsley, R. S. Staunton, E. A. Thurburn, and J. Longmuir, in equal sums of 17,750, each of whom were allotted 177 shares of 100 rupees in respect of these contributions, and a further allotment of 100 paid-up shares. Thus the four contributories had 1,108 shares nominally worth Rs. 1,10,800, and the vendor and his nominee had 290 shares nominally worth Rs. 29,000.

Campbell was appointed manager, and it was agreed that if, within three years from January 1st, 1875, the shares were sold at 25 per cent premium, 100 paid-up shares should be allotted to Campbell. This, with two shares allotted to Baroda Prosad Mitter, made up the 1,500 shares, which constituted the nominal capital of the Company. Of Thurburn's 277 shares, 138 were, at his request, allotted to his partner J. Thomas. Messrs. Thomas and Co. financed the Company, and, by the close of 1877, the Company was indebted to them for Rs. 36,688.

At a meeting of the Directors held on the 14th January 1878, it was announced, that Messrs. Thomas and Co. refused to finance the Company any longer; the Secretary was authorized "to make the necessary financial arrangements for 1878, not to pay more than 10 per cent. on advances." A statement was

submitted of liabilities and of certain debit entries carried forward to 1878-79, the estimated out-turn and a probable resulting debit balance for 1877 of Rs. 3,388.

On the 11th of January 1878 Kernot purchased Thomas's and Thurburn's 277 shares, and, at the meeting of the 14th of January 1878, Kernot and Longmuir were appointed Directors in the place of Thurburn and Kingsley. On 15th of January 1878 Kernot sold thirty shares to J. Hart, J. Majee, and J. M. Crowley, in equal lots of ten. It was then arranged that Kernot should finance the Company, and on the 16th of January he advanced Rs. 30,200, which was mainly appropriated to payment of the debt due to Thomas and Co.

On 12th of December 1878, at a meeting of the Directors, a statement was submitted, showing a probable debt at close of the year of Rs. 71,416. Another meeting of the Directors was held on the 14th of January 1879, at which Kernot showed a balance in his favour of Rs. 63,569, and an order was passed to get more power to borrow at the next shareholders' meeting. The ordinary general annual meeting was held on the 10th of April 1879, and it was resolved, that, in terms of the 13th article of association, the Directors are hereby empowered to borrow. This resolution does not appear to have been confirmed in the mode required by art. 51, and accordingly never to have become a special resolution.

At a meeting of the Directors in June 1879, it was recorded that the liability of the Company amounted to Rs. 80,061.

At an extraordinary meeting on the 4th of October 1869, the meeting sanctioned a mortgage to Dr. Kernot of the Company's property (except a specified garden) "to secure payment of a sum not exceeding one lac for advances already made or to be made, and interest at 7 per cent. This resolution was confirmed at the extraordinary meeting on the 16th of October. On the 8th of November Kernot resigned his seat in the Board.

At a meeting of the Directors on the 13th of December 1879, the mortgage was laid on the table, and the debit balance was stated to be Rs. 85,846.

On the 22nd of December 1879, Longmuir, Hart, and Barlow

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(holding 257+10+50 = 317 shares respectively) executed the mortgage.

On the 15th of February, Kernot resumed his seat at the Board, and was re-elected at the ordinary general meeting on the 13th of March 1880, and acted as such till the 10th of April, when he resigned on his departure for England.

These facts appear to establish that the Company was, from the outset, without any means of meeting the current expenses incidental to its business, payment of officers, outlay in plant, wages and food of coolies, &c., &c.; and that the course of business was, as it is we believe with the greater number of these Companies, that the concern should be 'financed,'—that is to say, that some agent in Calcutta or elsewhere should make the advances necessary to meet current expenses, selling and giving credit for all sums received for sales of tea, and striking a balance at the close of the half-year. The result of this arrangement was a debit balance against the Company of Rs. 36,000 odd at the close of 1877, when Messrs. Thomas and Co. gave up their connection with the Company, and it had risen to about 87,000 at the time when Dr. Kernot's mortgage was executed.

Dr. Kernot's account of the arrangement is as follows: "I say that there was an account-current between me and the Company; that I provided funds for the management of the Company's tea garden in Assam, and other purposes of the Company as required, all moneys received by the Company being paid over to me in reduction of my advances; that interest was charged on the balance due to me at 10 per cent per annum; that from the nature of the business it was impossible to foresee what amount might be required at any particular time; and that the state of the balance was also liable to be affected by the time of arrival of consignments of tea and the prices of tea fetched at any sale. And I further say that the Company had to provide for the wages and rice for the coolies in the gardens, and the expenses of working in Assam; and the custom was for the manager to draw bills on the Secretary in Calcutta for moneys he required, which bills were negotiated with certain Marwari merchants or Kyahs at Debroghur in Assam. And I

further say, that this custom is very general in Assam owing to the difficulty in remitting money; and also that when these bills were presented to the Secretary, it was necessary for preserving the credit of the Company that they should be at once taken up; and that new funds not being immediately forthcoming to finance the gardens, the coolies under engagement there would have also broken their engagements and run away, and the property would have gone. I also say that money was also frequently required for the heavy litigation in which the Company was involved, and I was compelled for the preservation of the property of all concerned to continue making the advances."

We believe that this statement is substantially true, and the point which we have now to decide is, whether the system of advances thus described was beyond the powers of the Directors so soon as the sum due from the Company to Dr. Kernot amounted to more than Rs. 50,000, no previous sanction having been given to the advances by any special resolution.

The articles of association embody those given in the first schedule to the Joint Stock Companies' Act, so far as they are consistent with the articles. Article 13 further provides, that the "Directors may, from time to time, if they shall see fit, without any previous consent of the shareholders, borrow any sum or sums of money, not exceeding in the whole Rs. 50,000, on the bill, bond, note, or other security of the Company, at such rate of interest and upon such terms as they may think proper; and the Directors may, with the sanction of a special resolution of the Company, previously given in general meeting, borrow on mortgage of the Company's property or otherwise, any sum or sums of money, not exceeding in the whole, together with the said sum of Rs. 50,000, the sum of Rs. 1,00,000."

The Official Liquidator contends that the effect of this article was to render illegal and irrecoverable as against the Company all advances made by Dr. Kernot, previous to the 16th of October 1879, in excess of Rs. 50,000.

We think that this depends upon whether the advances so made can be regarded as a borrowing by the Directors within

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the meaning of art. 13. If they were, there is certainly some difficulty in saying that the Directors had any power to contract the loans, or that the loans were ever legally ratified by the Company. But we have been referred to several cases, which do not appear to have been noticed by the learned Judge in the Court below, in which the English Courts have drawn a distinction between loans which a Company is empowered to raise under its borrowing powers, and debts which, in meeting its current liabilities and in the actual carrying on of its affairs, the Company or its agents on its behalf have contracted. In *In re Cefn. Cilcen Mining Company* (1), one Director had drawn bills which were accepted by another and endorsed by the Company to the Bank and discounted by the Bank. The proceeds were devoted partly to liquidating the Company's overdrawn account, about £200, and the residue to the purposes of the Company. At the date of the winding-up order, there was due to the Bank for bills so drawn, accepted, discounted and ultimately dishonored £1,039. The Directors were precluded by their articles from borrowing more than £500, without special resolution. It was held by Stuart, V. C., that this transaction, though the benefit resulting to the Company was the same, was not borrowing and lending within the meaning of the articles of association, and that a debt due to a Bank by a Company which keeps an account with it is a debt, not a loan. The same view was expressed by Stuart, V. C., in *Waterlow* v. *Sharp* (2). There a Banking Company had allowed a Railway Company to overdraw to the amount of £65,000, which was headed 'loan account,' and it was contended that this was a loan and *ultrâ vires*. It was, however, held, that a cash credit with a Bank is not a loan, and that this was so notwithstanding that the cash credit was headed 'loan account.'

The principle there laid down was applied in a somewhat different way *In re The German Mining Company* (3), *Ex parte Williamson* (4), and other cases, where it has been held that if money has been actually spent in defraying debts which

(1) L. R., 7 Eq., 88.
(2) L. R., 8 Eq., 503.
(3) 4 De G. M. & N., 19.
(4) L. R., 5 Ch., 313.

were legally recoverable from the Company, the person who advances the money can claim to stand in the place of the creditors who have been so paid.

Now in this case, from the first moment the Company started, it was worked on this system of advances by Messrs. Thomas and Co., who set off the sums advanced against the proceeds of the sales as they accrued. After a while Messrs. Thomas and Co. refused to go on, whereupon Dr. Kernot, apparently with the consent of the Directors, paid off the debt balance of Thomas's account, and continued to advance funds from time to time as necessity arose for the purposes of meeting the expenses.

It seems to us impossible to distinguish this case from those which were decided by Stuart, V. C.; and as we do not find that the principle upon which those cases proceeded has ever been overruled, we gladly avail ourselves of those authorities for the purpose of doing what appears to us the most palpable justice to Dr. Kernot. It has not been suggested before us that Dr. Kernot acted otherwise than in perfect good faith, or that the sums which he advanced were not necessary for the carrying on the business of the Company or not properly expended in that business.

Then the validity of Dr. Kernot's mortgage has been impugned upon the ground that the power conferred by art. 13 to borrow on bond, mortgage or other security, or otherwise, did not justify a mortgage, the object of which was in part to cover previously incurred liabilities. We think, however, that the English cases—*The Birmingham Banking Company* (1) and the *Inns of Court Hotel Company* (2)—sufficiently dispose of this objection. There is nothing in the Companies' Act or in the articles of association, or memorandum of association, of the Company to render such a mortgage invalid. The system of 'financing' the current expenditure appears to have been from the outset the regular mode of transacting the Company's business, repeatedly brought to the knowledge of the shareholders, and the mortgage, to cover those advances made, appears to us to be one of those things which was expedient

(1) L. R., 6 Ch. Ap., 83. (2) 6 Eq., 82.

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and necessary under the circumstances for attaining the objects of the Company, which are declared by art. 4 to be included in the business of the Company.

The decree must accordingly be amended, so far as it disallows that portion of the principal debt due to Dr. Kernot which was incurred previously to October 16th, 1879, in excess of Rs. 50,000; and it must be declared that the claimant is entitled under the mortgage to charge the Company with all advances made by him; but that he is only entitled to avail himself of his mortgage-security to the extent of a principal sum of one lac of rupees.

The fifth ground of appeal is as to interest, but we find that the decree allows 10 per cent., the rate at which we understand the advances to have been made.

The sixth ground is as to costs. As we hold the advances not to have been *ultrâ vires*, and as the Liquidator raised the objection of a fraudulent preference, we think that Dr. Kernot is entitled to his costs, especially having regard to the covenant on this point in the mortgage-deed. The order of the Original Court is modified accordingly, and Dr. Kernot is entitled to his costs in this Court and the Court below on scale 2. The Official Liquidator will have his costs here, as in the Court below, out of the estate.

Appeal allowed.

Attorney for the appellant: Mr. *Hart.*

Attorney for the respondent: Mr. *Eggar.*

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Cunningham.

THE ADMINISTRATOR-GENERAL OF BENGAL (DEFENDANT) *v.* MIRZA AHMED BEGG (PLAINTIFF).

1882 *July* 12.

Decree—Construction of Decree—Mortgage-Decree directing accounts, &c., to be taken and Report given—Tender of Principal and Interest before Report—Refusal to accept Tender and subsequent charge of Interest.

A decree directed accounts to be taken of what was due for principal and interest under a mortgage, such interest to be allowed "up to the time of payment hereinafter mentioned or until six months from the date of the decree," whichever first should happen; and further directed the plaintiff to pay what should be reported due for principal and interest up to the date of payment, and cost, with interest at 6 per cent. from the date of taxation until payment, within six months after the Registrar should make his report.

The plaintiff tendered a sum sufficient to cover the principal and interest due, but insufficient to cover costs, at a time prior to the drawing up of the Registrar's report.

Held, that the payment of principal and interest "hereinafter mentioned" referred to a time after the Registrar had made his report, because the sum to be paid was a sum reported to be due by the Registrar, and that, therefore, a tender made before the Registrar's report was given was not a sufficient tender to stop interest from the date of the tender.

THIS was an appeal from a judgment of Mr. Justice WILSON, dated the 8th December 1881.

One Mirza Ahmed Begg brought a suit against one Newal Hozoor and the Administrator-General of Bengal on two several mortgages, for an account and sale, and for the appointment of a receiver. On the case coming on for hearing, the plaintiff, who was the second mortgagee, agreed to pay off the Administrator-General of Bengal, who was the first mortgagee; and Mr. Justice White, on the 20th of December 1880, passed a decree directing an account to be taken of what was due to the Administrator-General of Bengal for principal and interest on his mortgage, "such interest to be allowed as provided by the mortgage up to the time of payment hereinafter mentioned, or until the end of six months from the date of the decree, whichever should first happen, and thereafter on the aggregate amount of such principal and interest at six per cent. per annum;" and

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directing an account of the principal and interest due in respect of a sum of Rs. 10,880, paid on the 16th of September 1878, for an assignment of a certain decree in the Court of the Subordinate Judge of the 24-Parganas, "such interest to be allowed at 12 per cent. per annum from the 16th of September 1878, up to the time of payment thereinafter mentioned, or until six months of the date of the decree." The decree further directed the plaintiff's and the Administrator-General's costs of the suit and of all proceedings adopted by them, either in the Original and Appellate Court, or in the Court of the Subordinate Judge, to protect their interests under the said mortgages, to be taxed as between attorney and client; the costs of the present suit to be taxed under the heading class 2 ordinary causes. The plaintiff paying to the Administrator-General what should be reported to be due for principal and interest up to the date of payment and his costs with interest thereon at the rate of six per cent. per annum from the date of taxation until payment within six months after the Registrar should have made his report.

On the 19th of March 1881, the Administrator-General filed his statement of facts, showing that there was due to him Rs. 53,186; and on the 30th of March 1881, the plaintiff tendered to the Administrator-General Rs. 46,000, the amount of principal and interest due. The Administrator-General refused to accept the tender, on the ground that, under the decree, payment was not to be made until after the Registrar had made his report.

The plaintiff thereupon gave notice to the Administrator-General of his intention to pay the money into Court, and deposited the amount.

On the 5th of July 1881, the Registrar, in his minute, found that the Administrator-General was not bound to accept the tender, the tender being insufficient for the payment of costs, and therefore insufficient for the payment of the whole amount payable under the decree; and that the plaintiff was not entitled to claim the benefit of ss. 376 to 379 of the Civil Procedure Code, under which the sum of Rs. 46,000 had been paid into Court;—1*st*, because deposit was made after decree; and 2*nd*, because

although notice of the intention to deposit was given, yet no notice of the deposit having been made was served.

On the 13th of September 1881, the Registrar, in pursuance of the decree, reported that (i) there was due to the Administrator-General on his mortgage Rs. 40,573 for principal, and interest to the 19th of June 1881, being six months from the date of the decree, with interest thereon at the rate of 6 per cent. per annum, from the 20th of June 1881 until realization, as per account annexed to the report; and (ii) that there was also due to him a sum of Rs. 6,594 for principal and interest to the 19th of June 1881, being six months from the date of decree, after debiting all sums received by him from the Court of the Subordinate Judge, as per account annexed to the report.

The plaintiff took exception to the report on the following grounds:

First.—That the Registrar should not have allowed the Administrator-General interest on the principal sum claimed, after the 30th of March 1881, the date of the tender.

Second.—That the Registrar should have held that the tender was sufficient, and that the plaintiff had complied with ss. 376 to 379 of the Civil Procedure Code in giving notice of the deposit.

At the hearing of the exceptions to the report, Mr. Justice WILSON decided, that, in this country, a mortgagee claiming his money was not entitled as of right to six months' interest, but that the decree would entitle the mortgagor to stay interest by an early payment; that, as regards the question whether the tender was sufficient to stay interest (the money due for costs not having been tendered), the decree and mortgage premises standing as security for costs, the case of *Letts* v. *Hutchins* (1) was in point, and that, applying the principles of that case to the one then before him, the true rule was, that principal and interest having been tendered, interest should cease from the time of the tender. But the tender being insufficient to cover costs, the Administrator was entitled to proceed to recover them. The report was, therefore, ordered to be varied.

(1) L. R., 13 Eq., 176.

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The Administrator-General appealed.

The *Officiating Advocate-General* (Mr. *Phillips*, with him Mr. *Paulit*) for the appellant.—I submit that I cannot be paid off until the costs of the suit are taxed, and that interest runs until taxation. The tender was not sufficient to stop interest, it being an incomplete tender of the whole sum due under the decree. The Court below was, therefore, wrong in varying the report by disallowing interest after the 30th of March 1881.

Mr. *Evans* (with him Mr. *Bonnerjee*) for the respondent.—The words "time hereinafter mentioned" in Mr. Justice White's decree cannot allude to the time in the Registrar's report appointing a time for reconveyance. If the decree does not tell us what our rights are as to the stoppage of interest, will a Court of equity interfere? [GARTH, C. J.—You had no right before the report was made to make a tender, but nevertheless you must be bound by the decree.] The case of *Letts* v. *Hutchins* (1) does not apply, as the mortgagee was desirous of being paid off, and filed a bill for that purpose; and he was not in a position to demand six months' notice, or interest in lieu of notice; the real question is whether there is any right to six months' notice at all, there being no such stipulation in the mortgage. As regards the right of a mortgagor to repay before the expiration of the usual six months ordinarily allowed by decree, see *Chotoolall* v. *A. B. Miller* (2).

The judgment of the Court (GARTH, C.J., and CUNNINGHAM, J.) was delivered by

GARTH, C. J.—We have had some difficulty in determining what is the true meaning of the decree in this case.

It may be that it was the intention of the learned Judge who made it to allow the plaintiff to pay his mortgage-money and interest when he chose; but we are bound to put a construction upon the language of the decree itself, and we think that the words "up to the time of payment hereinafter mentioned"

(1) L. R., 13 Eq, 176. (2) 7 C. L. R., 267.

can refer to no other time of payment than that which is mentioned later on in that part of the decree which relates to the reconveyance of the property; and the time of payment there mentioned seems, according to the best construction that we can put upon the sentence, a time after the Registrar has made his report, because the sum to be paid is to be a sum reported to be due by the Registrar.

After the able arguments which have been addressed to us in this case, and the difficulty which we feel even now in saying what the decree really means, it is impossible to avoid the conclusion that the decree has not been drawn as clearly as it might have been. We only hope that the difficulty which we have had, and the expense which has been occasioned to the parties, will operate as a wholesome warning in the future.

It is true that the parties themselves are, to some extent, in fault, for having approved of the decree in its present shape; but each party may possibly have construed it in his own way, and been perfectly content with it according to his own construction.

The report, therefore, of the Registrar will be confirmed as it originally stood, and we think that each party must pay his own costs of this appeal on scale 2.

Appeal allowed.

Attorney for the appellant: Mr. *Dover.*

Attorney for the respondent: Baboo *Nobin Chunder Burral.*

CRIMINAL REFERENCE.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

1882
May 25.

IN THE MATTER OF THE MUNICIPAL COMMITTEE OF DACCA.
THE MUNICIPAL COMMITTEE OF DACCA *v.* SOMEER.*

Bench of Magistrates, Power of—Beng. Act V of 1876, *ss.* 180, 215, 216—*Omission to remove obstruction.*

A notice was issued under s. 215, Beng. Act V of 1876, requiring *A* to remove an alleged obstruction. The requisition was not complied with, and *A* was prosecuted for non-compliance therewith, under s. 216, before a Bench of Honorary Magistrates.

Held, that the Court had power to inquire whether the alleged obstruction was, in point of fact, an obstruction or not.

THIS was a reference under s. 296 of Act X of 1872 from the Magistrate of Dacca. A requisition, in respect of an alleged obstruction, was, on the 28th of February 1882, issued on the accused Someer Tamakalla by the Secretary to the Municipal Commissioners of Dacca, under s. 215, Beng. Act V of 1876. The accused neither obeyed the order nor preferred an objection under s. 180 of the same Act. He was, therefore, prosecuted under s. 216 of the Act.

A Bench of Honorary Magistrates discharged the accused, because, in the opinion of one of their number, who visited the place, there had been no encroachment. The Magistrate referred the case to the High Court, it being his opinion that "a Court, trying a case under s. 216 of Beng. Act V of 1876, has no authority to inquire whether there was any encroachment justifying the issue of a requisition. That is an issue for the trial of which the law has provided in s. 180 of the said Act, which allows the person served to make an objection, and I submit that, on his failure to file any such objection, the requisition becomes absolute and must be obeyed, and that, when the

Criminal Reference, No. 105 of 1882, and Letter No. 1334, from the order made by E. V. Westmacott, Esq., Officiating Magistrate of Dacca, dated the 11th May 1882.

person is prosecuted for disobedience thereof, it is too late to open the question as to there having been any encroachment."

No one appeared on the reference.

The judgment of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

PRINSEP, J.—We are of opinion that the Bench of Magistrates had jurisdiction, in a prosecution under s. 216, Beng. Act V of 1876, to determine whether the order which had not been carried out was a proper order,—that is to say, in the present case, whether there had been any encroachment on the road which the accused was bound to remove on the order of a Municipal authority. It has been held, in an analogous case under s. 518 of the Code of Criminal Procedure, that, when prosecuted under s. 188, Penal Code, for neglecting to carry out an order of a Magistrate to remove a nuisance, that although that order, if properly made, cannot be questioned in any Court, the accused can, when prosecuted for disobedience of it, claim exemption from its operation on the ground that it was not an order which he was bound to obey, as being an order beyond the Magistrate's power and jurisdiction.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

DEBI CHURN BOIDO (PLAINTIFF) *v.* ISSUR CHUNDER MANJEE AND ANOTHER (DEFENDANTS).

1882 *June* 19.

Suit for Possession—Ejectment—Onus probandi—Evidence—Previous Possession.

Where, in a suit for possession of land, the plaintiff proves merely that he has been in possession of the disputed land at some time within twelve years previous to the filing of the plaint, such evidence is not sufficient to throw upon the defendant the burden of proving his title to the land.

Wise v. *Amirunnessa Khatoon* (1) followed, and *Gour Paroy* v. *Wooma Soonduree Debia* (2) cited.

* Appeal from Appellate Decree, No. 518 of 1881, against the decree of J. F. Browne, Esq., Judge of the 24-Parganas, dated the 11th January 1881, affirming the decree of Baboo Jogendro Nath Roy, Second Munsif of Diamond Harbour, dated the 27th April 1880.

(1) L. R., 7 I. A., 81. (2) 12 W. R., 472.

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THIS was a suit for possession of two bighas of land, which, the plaintiff alleged, formed part of thirty-five bighas, for which his predecessors had obtained, on the 22nd of June 1858, from one Sumbhoo Chunder Ghosh. The plaintiff stated that he had been in possession of the disputed portion, but that the defendants dispossessed him by making excavations therein and by enclosing it within boundary-marks. The defendants contended that the disputed land formed part of their jamai land, and that the plaintiff was never in possession of it.

The Court of first instance fixed two issues:—(i) "Whether the suit is barred by limitation; (ii) whether the disputed land is covered by the plaintiff's patta or by the defendants' patta; and, having found both against the plaintiff, dismissed the suit with costs. The plaintiff appealed to the District Judge, the first ground of appeal being that the decision of the Munsif was against the weight of evidence. The Judge said:—"With reference to the first ground of appeal, this Court is clear that there was no satisfactory evidence before the Court to show that the land claimed belonged to the plaintiff's land. The plaintiff never had mentioned any measurement paper or dagh thereof, and never tried to get the landlord to produce any. Nothing that his witnesses have said could justify a decree in plaintiff's favour." He then dismissed the appeal with costs.

The plaintiff appealed to the High Court on several grounds, among which were the following:—"(i) That the plaintiff's case, as laid in his plaint, being a case of forcible dispossession by the defendants, the learned Judge has committed an error in law to hold that the plaintiff having failed to prove the disputed land to be his pattai land, nothing that his witnesses have said could justify a decree. It is submitted that mere proof of possession within twelve years prior to suit in such a case is sufficient to shift the *onus* upon the defendants; (ii) for that the sole contest between the parties being a boundary dispute as between themselves, the learned Judge should have given a decree to the plaintiff upon mere proof of possession; (iii) for that, under s. 110 of the Indian Evidence Act, the *onus* of proving title is shifted on the defendants, if the plaintiff's prior possession be proved, which the learned Judge should have

found, the more so when he does not disbelieve the evidence of the plaintiff's witnesses."

Baboo *Anund Gopal Palit* for the appellant.

Baboo *Jadub Chunder Seal* for the respondents.

The following judgments were delivered:—

O'KINEALY, J.—In this suit the plaintiff claimed that the disputed parcel of land was situate within his jama, and that he had been lately dispossessed from it by the defendants. The defendants, on the other hand, contended, that the land formed part of their jote, and that the plaintiff had never been in possession. In the first Court the Munsif, coming to the conclusion that the plaintiff had not been in possession of the land within twelve years, dismissed the suit. The plaintiff appealed, and on the case coming before the District Judge, he arrived at the conclusion that, as the plaintiff had never measured the land, nor produced any documentary evidence through his landlord, that the land had been measured by the latter, nothing that he could produce in the way of oral evidence would be sufficient to justify a decree.

In this Court it has been urged upon us, that, under s. 110 of the Indian Evidence Act, as the plaintiff had proved possession for some time within twelve years before the suit, that possession by itself shifted the onus of proving title from the plaintiff to the defendants, and that in this case the onus was wrongly placed. Further it is said that the plaintiff was not debarred by the non-production of documentary evidence from proving his title in whatever way he deemed best.

In support of the first contention the learned pleader has referred to *Gour Paroy* v. *Wooma Soonduree Debia* (1), and he has intimated to us that this decision is to be supported on the ground that it is based upon English law. We are of opinion that this contention is unsound. The same question was before their Lordships of the Privy Council in the case of *Wise* v.

(1) 12 W. R., 472.

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Amirunnessa Khatoon (1), and their Lordships held, that land to which a plaintiff is unable to make out a title cannot be recovered on the ground of previous possession merely, except in a suit under s. 15, Act XIV of 1859, now s. 3 of the Specific Relief Act (I of 1877), which must be brought within six months from the time of dispossession. This decision in our opinion settles the matter.

In regard to English law it may well be that the difference of opinion referred to in the case of *Asher* v. *Whitlock* (2) will be settled in accordance with the decision in that case, but it is not quite certain that it would support the appellant's contention to the extent urged before us. The same point was also touched upon in the case of *Danford* v. *McAnulty* (3), and there Bramwell, L.J., said:—"A man in possession of land has a right to call upon a plaintiff in ejectment to prove his title; if the plaintiff does prove a *primâ facie* title, then the man in possession must prove his. The rule is the same in respect of chattels; an action is brought to recover a chattel, the plaintiff must show a title to the chattel before he can call upon the defendant to prove his title." But whatever may be the result of these cases, it is evident that, according to the law of this country, as authoritatively laid down by their Lordships of the Privy Council, mere anterior possession is not sufficient proof of title to dispossess a person in possession. We are, therefore, of opinion that this ground cannot succeed in second appeal.

In regard to the second point, we think that the appellant has made out a case sufficient to justify a remand. We are of opinion that the District Judge was not justified in restricting the plaintiff as to the manner in which he should prove his case, and that the case must go back in order that he should determine on the whole evidence on the record whether the plaintiff has a title to the land. Costs to abide the result.

PRINSEP, J.—I also concur in remanding this case. On the question of onus in a suit to recover possession of immove-

(1) L. R., 7 I. A., 81. (2) L. R., 1 Q. B., 1.
(3) L. R., 6 Q. B. D., 645.

able property, not being a possessory suit under s. 9 of the Specific Relief Act, I have always held the opinion now expressed by my learned colleague, and in one case I was overruled by the learned Chief Justice and Morris, J. The judgment of the Privy Council which has just been referred to was not quoted in argument to us, and as that, in my opinion, settles the law, it does not become necessary, according to the usual rule, to refer the point for the decision of a Full Bench.

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DEBI CHURN BOIDO v. ISHUR CHUNDER MANJEE.

Case remanded.

Before Mr. Justice Mitter and Mr. Justice Maclean.

LUCHMI NARAIN SINGH (DEFENDANT No. 1) *v.* ASSRUP KOER AND OTHERS (PLAINTIFFS).*

1882 *April 5.*

Limitation Acts (IX of 1871), *sched. ii, art.* 15; *and (XV of* 1877), *sched. ii, art.* 11—*Suit to recover Property sold in Execution—Civil Procedure Codes (Act VIII of* 1869, *s.* 246) and (*Act X of* 1877, *ss.* 280, 281, *and* 282.)

Certain property, which the plaintiff alleged to belong to her, was sold in execution of a decree obtained by the purchaser of the property at the auction-sale, against a third party. The plaintiff put in a claim to the property under s. 246 of Act VIII of 1859, which claim was rejected on the 6th of September 1873.

The plaintiff, on the 10th of January 1878, brought a suit to recover possession of the property sold. *Held*, that the suit was not barred under art. 11 of sched. ii of Act XV of 1877, which refers to the section in Act X of 1877, corresponding to s. 246 of Act VIII of 1859; and that the suit was not barred by art. 15, sched. ii of Act IX of 1871, the suit not being one to set aside a summary order within art. 15 of the schedule to that Act.

Koylash Chunder Paul Chowdhry v. *Preonath Roy Chowdhry* (1) followed.

THIS was a suit to recover possession of 118 bighas of land with mesne profits.

The plaintiff alleged that part of the land in question stood in the name of her deceased husband, being his self-acquired

Appeal from Appellate Decree, No. 1939 of 1880, against the decree of J. F Stevens, Esq., Officiating District Judge of Sarun, dated the 20th of July 1880, modifying the decree of Baboo Grish Chunder Chowdhry, First Subordinate Judge of that district, dated the 31st of March 1879.

(1) I. L. R., 4 Calc., 610.

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LUCHMI NARAIN SINGH v. ASSRUP KOER.

property; and that the remainder was acquired by herself in the name of the *pro formâ* defendants, Nos. 3 and 4, who were her servants, at a time when her husband was insane; and that she took possession of these lands on her husband's death. That, in satisfaction of a decree obtained by the defendant No. 1 against the defendant No. 2, the defendant No. 1 attached and put up for sale 42 bighas of land belonging to her; that she thereupon put in two claims on the 12th of February and 1st of September 1873 respectively (presumably under s. 246 of the Civil Procedure Code) to two separate portions of the 42 bighas; but that these claims were disallowed on the 3rd of March and 6th of September 1873; and the defendant No. 1, on the 31st of March and 18th of September, sold the property under the Court and purchased them himself. On the 6th of September 1873, she then brought a suit to confirm her possession, and this suit was dismissed on the 6th of September 1873, on the technical ground that she was not in possession at the time of suit, and the decree was confirmed on appeal on the 23rd of July 1875.

That the defendant No 1, in further execution of his decree, attached and brought to sale, on the 4th of July and 13th of November 1876, 74 bighas more of her properties, and at the sale himself became the purchaser; that she put in her claim to the 74 bighas mentioned (after delivery of possession had been given) for an adjudication under s. 269 of Act VIII of 1859, but the Court, on the 19th of February 1877, refused to entertain her claim, on the ground that the section was inapplicable; that she then brought the present suit on the 10th of January 1878 to obtain possession of the entire 118 bighas with mesne profits, stating that although her causes of action arose on different dates, *viz.*, on the 23rd of July 1875 and on the 19th of February 1877, she was entitled, under s. 44 of Act X of 1877, to join the several causes of action.

The defendants contended that the lands were the joint property of the plaintiff's husband and of the defendant No. 2, who were cousins, and that they were members of a joint family, and that the share of the plaintiff's husband, on his death, passed to the defendant No. 2, and that he was in possession at the dates of the different auction-sales; and that the suit was barred, it not

having been brought within one year from the date of either of the orders of the 3rd of March and 6th of September as provided for suits to set aside claims under s. 246.

The Subordinate Judge found that the husband of the plaintiff and the defendant No. 2 were not members of a joint family; that the land belonged to the plaintiff, and had been in her possession prior to delivery of possession to the defendant No. 1; that the plaintiff's claim to the 42 bighas first sold was barred by limitation, but that she was entitled to recover possession of the 76 bighas with mesne profits.

The plaintiff appealed to the District Judge as to that part of the lower Court's judgment which had declared her claim to the 42 bighas to be barred by limitation.

The Judge held, that the portion of s. 246 of the Civil Procedure Code, which provided a special rule of limitation, had been repealed by Act IX of 1871, and that the corresponding provision in that Act was not a re-enactment of the old rule; that the case of *Koylash Chunder Paul Chowdhry* v. *Preonath Roy Chowdhry* (1) had decided that the test to be applied in considering whether the provisions of art. 15, sched. ii, Act IX of 1871 applied to cases of this kind was, whether the relief sought could be given without setting aside the summary order; that, therefore, as no benefit could accrue to the plaintiff if the summary order refusing to release the property which had been attached were set aside, inasmuch as the property had since been sold, he set aside the judgment of the lower Court on the point which was in appeal before him. The defendant No. 1 also separately appealed on the ground that the case as regards the 76 bighas was barred under the special limitation provided by s. 269 of Act VIII of 1859. The District Judge dismissed the cross-appeal, on the grounds that the plaintiff's claims decided on the 1st of December 1876 and 19th of February 1877, being refused on the express ground that the provisions of s. 269 were not applicable, the special provision for limitation could not apply.

The defendant No. 1 appealed to the High Court.

(1) I. L. R., 4 Calc., 610.

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LUCHMI NARAIN SINGH v. ANRUP KOER

Baboo *Mohesh Chunder Chowdhry* for the appellant, amongst other contentions, raised the point that the suit was barred under art. 11, sched. ii of Act XV of 1877, as regards the 42 bighas, because the suit was not brought within one year from either of the two orders passed under s. 246, dated the 3rd of March and 6th of September 1873: *Krishnaji Vithal* v. *Bhaskar Rangnath* (1), *Jetti* v. *Sayad Husein* (2), and *Venkapa* v. *Chenbasapa* (3), *The Collector of Ahmedabad* v. *Semaldas Bechardas* (4).

Munshi *Mahomed Yusuff* for the respondent.

The following judgments were delivered by the Court (MITTER and MACLEAN, J.J.):—

MITTER, J.—We do not think that there is any ground for interference in this case. The Courts below have found that the plaintiff's husband was separate from the defendant No. 2, and that, after her husband's death, she was in possession of the disputed property until dispossessed. There is no ground upon which this finding can be questioned in second appeal. We must, therefore, accept it as correct. These two questions of law have been argued before us: 1st, that the plaintiff's suit is barred because a previous suit brought by her was dismissed. It appears that the previous suit referred to was dismissed not upon the merits, but upon the ground that the form in which that action was brought was not the correct form. She had alleged that she was in possession of the property in dispute, the Court found that she was not in possession, and simply upon this ground that suit was dismissed; therefore it cannot be said that that decision is any bar to the present suit under s. 13 of the Procedure Code. Neither is it a bar under s. 43. Section 43 is not applicable here, because the first suit was brought before the present Procedure Code was passed, and the rule of law laid down in s. 43 is laid down with reference to suits to be brought under the new Procedure Code. Under s. 7, Act VIII of 1859, the plaintiff was bound to include the whole of her claim arising out of the cause of action upon

(1) I. L. R., 4 Bom., 611.
(2) *Ibid*, 23n.
(3) I. L. R., 4 Bom., 21.
(4) 9 Bom. H. C. R., 205.

which the first suit was brought, and there is no question that in the first suit she had included the whole of her claim. Therefore there is no force in this contention. The next point of law that has been raised is, that the claim as regards a portion of the disputed land is barred because there were two orders passed under s. 246 against the plaintiff on the 3rd of March 1873 and 6th of September 1873 respectively, and the present suit is not brought within one year from either of those two dates. It is contended before us that the present suit, being governed by the Limitation Act of 1877, is barred; but the article to which reference is made, *viz.*, art. 11, does not refer to an order passed under s. 246, but to an order passed under the corresponding section of the Act of 1877. The Limitation Act must be construed strictly; and we cannot therefore say that, under art. 11, the present suit is barred. Then as regards the question whether it was barred under the Act of 1871, the District Judge follows the decision of this Court in *Koylash Chunder Paul Chowdhry* v. *Preonath Roy Chowdhry* (1). Beyond citing some contrary decisions of the High Court of Bombay, nothing has been urged before us from which we could say that the decision upon which the District Judge relies is not in accordance with law. Under the circumstances, we will follow the decision of our own Court. We dismiss this appeal with costs.

MACLEAN, J.—The decision of this Court in *Koylash Chunder Paul Chowdhry* v. *Preonath Roy Chowdhry* (1) and others to the same effect are, no doubt, in conflict with some of the Bombay decisions, and I am by no means certain that I do not agree with the latter. But I am not at present disposed to dissent formally from the view of the law laid down in our Court. I, therefore, concur in dismissing the appeal.

Appeal dismissed.

(1) I. L. R., 4 Calc., 610.

Before Mr. Justice McDonell and Mr. Justice Field.

1882
June 2

JAGUT CHUNDER ROY, *alias* BASHI CHUNDER ROY, AND OTHERS (PLAINTIFFS) *v.* RUP CHAND CHANGO (DEFENDANT).*

Landlord and Tenant—Notice to Quit—Reasonable Notice.

A tenant other than an occupancy ryot is entitled to a reasonable notice to quit. What is a reasonable notice is a question of fact, which must be decided in each case according to the particular circumstances and the local customs as to reaping crops and letting land It is not necessary that the notice must expire at the end of the year.

Janoo Mundur v. *Brijo Singh* (1) and *Rajendronath Mookhopadhya* v. *Bassider Ruhman Khondkar* (2) considered.

THIS was a suit for ejectment, after the issue of a notice to quit at the expiration of three months from the date of the notice. The defendant, who was a cultivating ryot, in his written statement, contended that the notice was not served on him, and that he had a right of occupancy. The Munsif gave the plaintiffs a decree. The defendant appealed, and on appeal contended that, being a cultivating ryot, he could only be ejected at the end of the year, and that the notice was, therefore, bad. The District Judge, upon the authority of *Bakranath Mundal* v. *Binodrum Sen* (3), *Bunwari Lal Roy* v. *Mahima Chandra Kunall* (4), *Janoo Mundur* v. *Brijo Singh* (1), and *Rajendronath Mookhopadhya* v. *Bassider Ruhman Khondkar* (2), decided that the notice was bad, as it required the defendant to quit before the end of the year. The plaintiffs appealed to the High Court.

Baboo *Chunder Madhub Ghose* and Baboo *Hem Chunder Banerjee* for the appellants.

* Appeals from Appellate Decree, Nos. 2431 and 2432 of 1880, against the decree of R F. Rampini, Esq., Officiating Judge of Dacca, dated the 21st September 1880, reversing the decree of Baboo Surbanund Dass, Second Munsif of that district, dated the 25th March 1880.

(1) 22 W. R., 548.
(2) I. L. R., 2 Calc., 146; S.C., 25 W. R., 330
(3) 1 B. L. R., F. B., 25; S.C., 10 W. R., F. B., 33.
(4) 4 B. L. R., Apx., 86; S.C., 13 W. R., 267.

Baboo *Bama Churn Banerjee* for the respondent.

The judgment of the Court (McDONELL and FIELD, JJ.) was delivered by

FIELD, J.—In this case the District Judge was of opinion that the notice to quit was bad, merely because the period allowed did not expire at the end of the year. He relies upon certain cases quoted in his judgment. With reference to the case of *Rajendronath Mookhopadhya* v. *Bassider Ruhman Khondkar* (1) we have to observe that the question referred to the Full Bench was—"Whether a ryot, whose tenancy can only be determined by a reasonable notice to quit expiring at the end of the year, can claim to have a suit brought against him by the landlord dismissed on the ground that he has had no such notice," &c. This assumed that the ryot in that particular case was entitled to a reasonable notice to quit expiring at the end of the year. No question was raised or decided as to whether, as a general principle, a notice to quit, in order to be reasonable, must expire at the end of the year. Then, in the case of *Janoo Mundur* v. *Brijo Singh* (2), Phear, J., said:—

"We perceive that it," that is, the notice, "was served upon the defendant in the month of Pous, three whole months before the expiration of the year, and therefore was, in respect of time, reasonably sufficient notice to quit." It appears to us that the learned Judge considered the notice to be reasonable in that case, not because it expired at the end of the year, but because it was a three months' notice. The other cases quoted by the District Judge do not, in our opinion, establish the proposition that a notice to quit given to a tenant other than an occupancy ryot must, in order to be reasonable, expire at the end of the year. We think that the result of the cases is, that such a ryot is entitled to a reasonable notice. What is reasonable notice is a question of fact which must be decided in each case according to the particular circumstances and the local customs as to reaping crops and letting land. In the present case a three months' notice was given, and there was no contention

(1) I. L. R., 2 Calc., 146; S. C., 25 W. R., 330. (2) 22 W R, 548.

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JAGUT CHUNDER ROY, *alias* BASHI CHUNDER ROY *v.* RUP CHAND CHANGO.

that, at the time when that notice expired, any crop was upon the ground, the necessity of removing which would have made the notice under the circumstances unreasonable. Further, the notice did, as a matter of fact, expire within seven days of the close of the year, and the facts of the case, therefore, are very similar to the case of *Janoo Mundur* v. *Brijo Singh* (1). We think, therefore, that the decree of the lower Appellate Court must be set aside and this appeal decreed with costs.

This judgment will admittedly govern Appeal No. 2432 of 1880.

Appeal allowed.

Before Mr. Justice White and Mr. Justice Macpherson.

1882 *May* 18.

GYANENDRO CHUNDER LAHIRI (PLAINTIFF) *v.* KALLA PAHAR HAJEE AND ANOTHER (DEFENDANTS).*

Hindu Law—Adoption—Simultaneous Adoption.

A simultaneous adoption is not valid according to Hindu law. The adoption of one son alone is actually and in itself wholly sufficient to satisfy the purpose of the law; the adoption of two is not within the scope of the power of adoption, and where such a thing is attempted, neither of the children is the legally adopted son of the deceased, although the ceremonies of adoption may have been performed as regards each and also at the same time.

Mr. *Branson* for the appellant.

Mr. *Evans* for the respondents.

THE facts of this case sufficiently appear from the judgment of the Court (WHITE and MACPHERSON, JJ.), which was delivered by

WHITE, J.—This is an appeal by the plaintiff in the first Court against a decision of the Officiating District Judge of Rungpore, reversing a decree of the First Munsif of Gaibanda passed in favour of the plaintiff.

* Appeals from Appellate Decree, No. 307 of 1881, and Nos. 687 to 697 of 1881, against the decree of T. D. Beighton, Esq., Officiating Judge of Rungpore, dated the 18th December 1880, reversing the decree of Baboo Gopi Mohun Mookerjee, First Munsif of Gaibanda, dated the 6th July 1880.

(1) 22 W. R., 548.

The lower Appellate Court has found that the two widows of Kali Kristo Lahiri,—namely, the defendant Shyama and one Brohmomoyi, who has since died,—adopted two sons at the same time under a written authority conferred upon each of them by Kali Kristo; and that the son adopted by Brohmomoyi is the plaintiff, and the son adopted by the defendant Shyama is one Norendro, who, however, is not a party to the suit. The lower Appellate Court holds, according to Hindu law, that a simultaneous adoption is bad, and that the plaintiff has, therefore, no right to bring the suit.

Against this decision the plaintiff appeals. As the point is one of great and general importance, we should have been glad to avoid deciding such a question in the present suit, which is only what is called a rent-suit. But as the ryot-defendant has never attorned to, or paid rent to, the plaintiff, and the plaintiff has not proved that the relation of landlord and tenant ever subsisted between himself and the ryot, the plaintiff can only recover his share of the rent on proving his title, and this depends on the validity of the simultaneous adoption.

This question has been very ably and exhaustively argued by Mr. Branson for the appellant and Mr. Evans for the respondents. They placed before us, and discussed at great length, all the ancient and modern authorities on the subject, and we have come to the conclusion that a simultaneous adoption is not valid according to Hindu Law.

Phear, J., in the case of *Sidessury Dossee* v. *Doorga Churn Sett* (1), decided on the 14th of July 1865, came to the same conclusion. His reasons for the decision are to be found in an elaborate judgment which that learned Judge gave in *Monemothonath Dey* v. *Ononthnauth Dey* (2) in the previous February. The latter case was appealed to a Bench consisting of Peacock, C.J., Trevor, J., and Sumbunath Pundit, J., who reversed, indeed, the judgment of Phear, J., but on another and a distinct ground. As regards the validity of simultaneous adoption, Peacock, C.J., says:—"It is not necessary to go to the extent to which the learned Judge below went, or to say

(1) 2 I. J., N. S., 22. (2) *Id.*, 24.

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that a simultaneous adoption must be bad." In another case—*S. M. Money Dassee* v. *S. M. Prosonomoye Dassee* (1), decided on the 20th of September 1866, the same question again arose before Peacock, C.J., and Norman, J., but was again not decided, the Court there saying :—" It is not necessary to say whether, if the widow had adopted two sons at the same time, they would have been regularly adopted sons according to Hindu law and so capable of being heirs of the testator." The judgment of Phear, J., therefore, on this point, has never been overruled, although it has not been affirmed by an Appeal Court.

Phear, J., discusses the conflicting authorities with the greatest fullness and minuteness. Having read and considered that judgment, we think that the learned Judge has deduced the right rule from the authorities.

He lays down the rule in these words :—" The power to adopt rests solely upon the religious necessities, so to speak, of the father, and is limited by them. It does not extend to enabling him to do more than is, at the time of exercising it, reasonably sufficient to satisfy the purpose for which the law exists. Consequently, supposing the occasion for exercising the power to have arisen, one son and one alone can be adopted." The words 'reasonably sufficient' might be taken to mean what a reasonable man might think sufficient to ensure his happiness in a future world, but the context shows that the learned Judge really meant that the exercise of the power of adoption must be limited by the necessity of the case.

Applying that rule, it follows that, as the adoption of one son alone is actually necessary, and is in itself wholly sufficient to satisfy the purpose of the law, the adoption of two is not within the scope of the power; and that where such a thing is attempted, neither of the children is the legally adopted son of the deceased, although the ceremonies of adoption may have been performed as regards each and also at the same time.

Such being our opinion, the result will be that the adoption of the plaintiff is invalid. Our decision on this point will not affect the other son, who is alleged to have been adopted with

(1) 2 I. J., N. S., 18.

the plaintiff at the same time, inasmuch as he is not a party to the suit, unless indeed his adoptive mother Shyama, who is a party, can be held to represent him in the present suit, upon which question we pass no opinion.

The appeal will be dismissed with costs.

This decision will govern Special Appeals Nos. 687 to 697, both inclusive.

Appeal dismissed.

CRIMINAL REFERENCE.

Before Mr. Justice Maclean and Mr. Justice Norris.

IN THE MATTER OF DHUNUM KAZEE AND ANOTHER.
THE EMPRESS *v.* DHUNUM KAZEE AND ANOTHER.*

1882 *July* 13.

Criminal Procedure Code (Act X of 1872), s. 263—Discretion of Court—Verdict of Jury—Forgery and Abetment—Acquittal by Jury—Disagreement by Judge—Principles guiding the Court's Discretion under s. 263 of the Criminal Procedure Code (Act X of 1872)—"Fraudulently and Dishonestly Uttering"—Intention—Inference of Fraud.

Notwithstanding the large discretionary powers vested in the High Court under s. 263 of Act X of 1872, the Court will adhere generally to the principle of the Courts in England, *viz.*, that the Court will not set aside the verdict of a jury unless it be perverse and potently wrong, or may have been induced by the error of the Judge; and when the Court is asked to do so on the ground that the verdict is against the weight of evidence, the question is, not whether the learned Judge who tried the case was or was not dissatisfied with the verdict, or whether he would have come to the same conclusion as the jury, but whether the verdict was such as reasonable men ought to have come to.

Where a person, in the course of an action brought against him to gain possession of a property, uses a forged document for the purpose of supporting his title, though there may be no necessity for the use of it, such a user is clearly fraudulent.

A general intention to defraud, without the intention of causing wrongful gain to one person or wrongful loss to another, would, if proved, be sufficient to support a conviction: and such an intention is a necessary inference

* Criminal Reference, No. 9 of 1882, and Letter No. 599, from the order made by T. D Beighton, Esq, Officiating Sessions Judge of Burdwan, dated the 7th June 1882.

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which the jury should be directed to draw, if they are satisfied that the accused has uttered a forged document as a true one, meaning it to be taken as such, and knowing it to be forged.

Under s. 263 of the Code of Criminal Procedure, a Court is authorized to ask the jury such questions as are necessary to ascertain what their verdict really is; but where the verdict, although perhaps erroneous, is not ambiguous, it is the duty of the Judge to record it without further question.

ONE Dhunum Kazee was charged under s. 471 of the Penal Code with having, on or about the 1st of February 1879, fraudulently and dishonestly used in the Munsif's Court a certain hiba, knowing, or having reason to believe, the same to be a forged document; and one Khorshed Kazee was charged, under ss. $\frac{471}{109}$ of the Penal Code, with abetting the fraudulent and dishonest use of the forged document. The document purported to be executed in favor of the accused by their father, and purported to have been registered on the 14th April 1854.

The evidence clearly showed that the certificate of registration was a forgery. The accused, therefore, contended that the charge related exclusively to the forgery of the executant's name, and not to the forgery of the certificate of registration. The jury unanimously acquitted the accused, but the Judge disagreeing with the verdict of acquittal on the sole ground that the verdict was against the weight of evidence, submitted the case to the High Court under s. 263 of the Code of Criminal Procedure.

It appeared from the Judge's report sent to the High Court, that, after the verdict was given, he asked the jury to give their reasons for the verdict, and that they replied "that there was no proof as to who forged the registration certificates,—*i. e.*, whether they were forged by the father of the accused or the accused themselves; and no proof to show when the certificate of registration was forged,—*i. e.*, whether before or after the hiba was filed in the Munsif's Court; and no proof that the accused knew that the certificate was forged; and that they, therefore, found that the registration certificate was a forgery, but not the executant's signature on the hiba."

Baboo *Umbica Churn Bose* for the appellants.

Baboo *Ram Churn Mitter* for the Crown.

The judgment of the Court (MACLEAN and NORRIS, JJ.) was delivered by

NORRIS, J.—In this case the accused Dhunum Kazee was charged under s. 471 of the Penal Code with having, on or about the 1st of February 1879, at the Jehanabad Munsif's Court, fraudulently and dishonestly used as genuine a certain document, dated the 12th Falgoon 1260, knowing or having reason to believe the same to be a forged document; and the accused Khorshed Kazee was charged under ss. $\frac{471}{109}$ of the Penal Code with abetting the fraudulent and dishonest use of the forged document knowing or having reason to believe that the same was forged. The jury unanimously acquitted the accused. The Officiating Sessions Judge of Burdwan, before whom the accused were tried, disagreeing with the verdict of acquittal, has submitted the case to the High Court under the provisions of s. 263 of the Criminal Procedure Code.

In arriving at a conclusion as to what principles should guide me in the exercise of the discretion given me by s. 263 of the Criminal Procedure Code, I am not left without authority. In *The Empress* v. *Mukhun Kumar* (1), Garth, C. J., says: "With regard to the first of these questions" (*i. e.*, how far the High Court is justified in a case referred under s. 263 of the Criminal Procedure Code in convicting the accused contrary to the express and unexplained finding of a jury) "it appears to me that, by that section, the Legislature intended to vest in the High Court a very large discretion, and that it would be improper for us, if not impossible, to lay down any fixed rule by which that discretion should be controlled; the verdict of a jury, who are the legally constituted judges of facts, and have the advantage of seeing the case tried and of hearing the witnesses examined," (and, what is more important, cross-examined) "ought always in my opinion to command its proper weight; and the more unanimous their verdict may be, and the less likely to have been influenced by prejudice or error, the more entitled it should be to our respect and consideration; but there may be many occasions where, as it seems to me, little or no weight

(1) 1 C. L. R., 275; at p. 281.

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should be attached to their verdict; as for instance where, out of a jury of five, three are of one way of thinking and two of another, and the presiding Judge agrees with the minority, or where it is manifest from the conduct of the jury or otherwise that their minds have been influenced by a prejudice which has prevented them from forming a correct judgment. In the exercise, therefore, of my own discretion in cases coming before us under this section, I should not go so far as to hold with Macpherson and Morris, JJ.—*Queen* v. *Wuzir Mundul* (1)—'that the verdict of a jury should not be interfered with except where there is a gross and unmistakable miscarriage of justice'; nor on the other hand, should I consider myself justified in deciding any case according to my own views of the evidence without giving the verdict of the jury its proper weight. Each case, in my view of the section, should depend upon its own circumstances."

In *Reg.* v *Khanderav Bajirav* (2), West, J., says: "The section we have quoted (*i. e.*, s. 263, Criminal Procedure Code) lays down that the Court may acquit or convict without reference to the charges made against the accused; in other words, the functions both of the Judge and jury are cast upon the Court, and this differentiates our position very widely from that of the Courts in England. Notwithstanding this difference, however, and the more onerous duties devolving in consequence on the High Courts in India, we still desire to be guided as far as may be by the analogies of the English law. It is a well recognized principle that the Courts in England will not set aside the verdict of a jury unless it be perverse and potently wrong, or may have been induced by an error of the Judge. We adhere generally to this principle notwithstanding our large discretionary powers; *first*, on the constitutional ground of taking as little as possible out of the hands to which it has been primarily assigned by the Legislature; and *secondly*; because any undue interference may tend to diminish the sense of responsibility which it is desirable that a jury should cherish. We think, however, that, by our rectifying a jury's verdict in

(1) 25 W. R., Cr. Rul., 25. (2) I. L. R., 1 Bom., 10.

a proper case, we shall increase, not diminish, that sense of responsibility."

The principles which guide the English Courts in deciding whether a new trial should be granted upon the ground that the verdict was against the weight of evidence were discussed in the recent case of *Solomon* v. *Bitton* (1), where the Court of Appeal said: "The rule on which a new trial should be granted on the ground that the verdict was unsatisfactory as being against the weight of evidence ought not to depend on the question whether the learned Judge who tried the action was or was not dissatisfied with the verdict, or whether he would have come to the same conclusion as the jury, but whether the verdict was such as reasonable men ought to have come to."

The Judge, in his report referring the case to us, makes no complaint of the conduct of the jury on the ground of prejudice; he complains only that the verdict was against the weight of evidence, and he seeks to substantiate that complaint by calling attention to the answers given by the jury to certain questions put to them by him after they had returned their verdict. I shall presently refer to these answers.

Endeavouring to guide myself by the light of the principles laid down in the decision I have quoted, I have to ask myself,—Is this verdict, which is sought to be set aside, such as reasonable men ought to have come to? In order to answer this question it is necessary to consider what the prosecution were bound to prove against the accused in order to justify a conviction. It was incumbent upon the prosecution to prove (i) that the document alleged to have been used by the accused was in fact a forged document; (ii) that it was used by the accused; (iii) that, at the time it was used by the accused, they knew or had reason to believe that it was a forgery; (iv) that, at the time they used it, knowing or having reason to believe that it was a forgery, they did so fraudulently or dishonestly. If any one of these points was left in doubt, the jury were bound to acquit. A verdict of acquittal would be such as reasonable men ought to have come to.

(1) L. R., 8 Q. B. D., 176

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The document, which was alleged to have been a forgery, was a hiba-bil-ewaz, or one of gift, purporting to have been executed in favour of the accused by their father Sadderuddin Kazee, and to have been registered by one Golam Russool, Kazee of Jehanabad, on the 14th April 1854. Sudderuddin Kazee died some ten or twelve years since, leaving the two accused, a daughter and a widow, the mother of his three children, him surviving. If the hiba was genuine, the widow and daughter were disinherited: if it was a forgery, the daughter became entitled to one-fifth of seven-eighths of her father's property upon his death. The daughter, after her father's death, married one Aminuddin Kazee. The prosecution alleged that both the father's execution of, and the Kazee's certificate of registration endorsed on, the hiba-bil-ewaz were forgeries; but they did not charge either of the prisoners with the actual forgery. Nothing worthy of the name of evidence was forthcoming at the trial to prove that the father's signature was a forgery, and practically that point was abandoned by the prosecution. On the other hand there was an overwhelming body of evidence, proving beyond all doubt that Golam Russool's certificate of registration was a forgery, and I am abundantly satisfied that it was a forgery. Thus the first point necessary for the prosecution to establish was established. The use of the hiba by the accused was also proved by their own admissions. Point the second has thus been established.

In order to establish the third point, which for brevity I will call a guilty knowledge on the part of the prisoners, the prosecution sought to prove that, after Sudderuddin's death, his widow lived in commensality with the accused; that the daughter enjoyed the property equally with them; that Aminuddin had tried to sell his wife's share to the accused; that not only did they not mention the hiba, but carried on negotiations for the purchase, which only fell through by reason of the accused not offering a sufficient sum; that the accused, after the negotiations with Aminuddin had fallen through, knowing that he was treating for a sale to one Sheikh Budruddin, allowed the treaty to continue and said nothing about the hiba; that, after the sale to Budruddin had taken place, when he went to

take possession, Dhunum Kazee told him that his (Dhunum's) brother was in Calcutta and would not return for fifteen days, when possession should be given; that, after the expiration of fifteen days, Dhunum told him that he would not give up possession; that when Budruddin sued the accused and their sister in the Munsif's Court, the accused, instead of producing the hiba, at once asked for fifteen days' time to put in their written statement, and, at the expiration of that period, asked for another adjournment, and subsequently for a third, and that it was not until after the third adjournment that the hiba was filed in the Munsif's Court. If these facts, or the more important of them, had been proved, I should have been of opinion that the jury, as reasonable men, ought to have come to the conclusion that a guilty knowledge on the part of the accused was established. But I am by no means satisfied that these facts, or the more important of them, were proved. They rested upon the testimony of Budruddin and Aminuddin. The former admitted that he had been imprisoned for three months for being in possession of stolen property: that he was on bad terms with the accused before his purchase from Aminuddin; that he had charged Khorshed with stealing a goat, which charge was dismissed; that since then he had had twenty or twenty-five civil suits with them; he also stated that Aminuddin was on bad terms with the accused. It is true that he says he still eats at the houses of the accused, but as I understand it is only in cases of the most bitter hatred that one Mahomedan will refuse to eat salt with another. Upon these admissions I am not satisfied with the truth of this witness's evidence. Aminuddin admits that he has had a suit with the accused, and that he is on bad terms with them, and that Budruddin used to assist him in his litigation with the accused; and though he says that three or four persons were present when he tried to sell the property to the accused, he cannot remember their names. I am not satisfied as to the truth of this witness's evidence. I am of opinion that the prosecution failed to prove a guilty knowledge on the part of the accused; and if I can see my way to this conclusion, how much more probable is it that the jury who had a full opportunity of judging of the credibility of the witnesses

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by observing their demeanour in the witness box, and how they went through their cross-examination, may have come to the same conclusion. It may, no doubt, be said, that the jury have not expressed any opinion upon the evidence of Budruddin and Aminuddin. It is sufficient to say in reply that their opinion was not asked, and as they found a general verdict of not guilty, I have a right to assume that this estimate of the evidence corresponded with the one I have formed.

This finding disposes of the case. I think it right, however, to deal with an argument that was advanced on behalf of the accused at the hearing before us. It was urged thus: "The accused had a good defence to Budruddin's action without having recourse to the hiba. That being so, even assuming that the hiba was forged and used by the accused with a guilty knowledge, yet, as there was no legal necessity for their using it, they cannot be said to have used it fraudulently or dishonestly." I am clearly of opinion that the use of the hiba under such circumstances was 'fraudulent.' The word 'fraudulently' is defined by s. 25 of the Penal Code thus: "A person is said to do a thing fraudulently if he does that thing with intent to defraud, but not otherwise." It is to be observed that this definition of 'fraudulently' differs entirely from that of 'dishonestly' as given in s. 24—"to do a thing dishonestly there must be the intention of causing wrongful gain to one person or wrongful loss to another;" and 'wrongful gain' is defined to be "gain by unlawful means of property to which the person gaining is not legally entitled;" and 'wrongful loss,' as "the loss by unlawful means of property to which the person losing it is legally entitled." A general intention to defraud without the intention of causing wrongful gain to one person or wrongful loss to another, would, if proved, be sufficient to support a conviction. Maule, J., says in *Reg.* v. *Nash* (1). "There may be an intent to defraud without the power or the opportunity to defraud," and at p. 503: "It is not necessary that any person should be in a situation to be defrauded." I am further of opinion that, in such a case as was put in argument before us,

(1) 2 Dearsly's C. C. R., at p. 500.

the intent to defraud the party to whom the document was uttered (in this case Budruddin) was a necessary inference which the jury ought to have been directed to draw: *Reg.* v. *Hill* (1) and *Reg.* v. *Cooke* (2). Let a person's title to property be ever so good, yet if, in the course of an action brought against him to gain possession of the property, he uses by way of supporting his title, though there may be no necessity for the use of it, a forged document, such as this hiba, I am clearly of opinion that he uses it fraudulently.

It now only remains for me to notice the answers of the jury to certain questions put to them by the Judge after they had delivered their verdict. In reply to questions from the Court the jury stated as the reasons for their verdict: "There is no proof to show when the registration certificate was forged,—*i. e.*, whether before or after the document A (the hiba) was filed in the Munsif's Court. There is also no proof as to who forged the registration certificate,—*i e.*, whether forged by the father of the accused or by the accused themselves; and in the former case that the accused knew they were forged. They find that the registration certificate is a forgery, but not the executant's signature on the document."

It was urged by the learned pleader who appeared for the Crown that these answers showed that the jury had come to very foolish conclusions upon the evidence, and that, in receiving their verdict, he ought to proceed upon the assumption that these foolish conclusions and these alone had induced them to return a verdict of acquittal. It may be that the conclusions are foolish, but I refuse to consider these answers at all, because I am of opinion that the Judge had no right to put the questions which called forth the answers. The Court is authorized by s. 263 to ask the jury such questions as are necessary to ascertain what their verdict is. In this case the jury had returned a plain, simple verdict of 'not guilty'; it may have been erroneous, but it certainly was not ambiguous, and the duty of the Judge was to receive it and record it without asking any questions about it.

(1) 8 C. and P., 274. (2) *Id.*, 582.

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For the reasons given above I am of opinion that the verdict of acquittal should stand.

Verdict upheld.

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr Justice Maclean.

1882 *April* 28.

JUGMOHUN TEWARI AND OTHERS (DEFENDANTS) *v.* FINCH (PLAINTIFF).*

Road Cess Act (Beng. Act X of 1871), ss. 5, 7, Part II, Schedule A, part u—Bhowli Tenures—Suit for Rent.

Section 5 of the Road Cess Act requires the holders of any estate or tenure, of which the annual rent shall exceed one hundred rupees, to lodge returns of all lands comprised in an estate or tenure; bhowli lands are, therefore, to be included in such returns.

Where such a return has not been made, the holder of the estate or tenure is precluded from suing for or recovering any rent due therefor.

THE plaintiff was the ticcadar of a certain mouza, and stated that the defendants held under him in ticca kasht 7 bigas 8 cottas 5 dhurs of this mouza at an annual rent of Rs. 15-10-6-1-8, and also 18 bigas 5 biswas of bhowli and sair land, the rent of which was paid in produce; and that the defendants not having paid the rent for these lands for the year 1283 (1876), he brought this present suit to recover the rent due. The defendants denied that they held any bhowli lands, but alleged they were the holders of an ancestral ticca tenure, in which the sair lands were included, the rent of which was Rs. 22-1-3, and in proof of this produced the receipt for rent for former years.

The Munsif found that the defendants were the holders of the bhowli lands mentioned, and gave the plaintiff a decree for the greater part of the amount claimed by him. The defendants appealed to the District Judge, contending that the plain-

* Appeal from Appellate Decree, No. 89 of 1881, against the decree of H. W. Gordon, Esq., Officiating Judge of Tirhoot, dated the 17th September 1880, affirming the decree of Baboo Ramyad Lall, Munsif of Tezpore, dated the 10th March 1879.

tiff had failed to prove his allegations as to area, rates, and bhowli tenure The District Judge found that the documentary evidence produced by the plaintiff sufficiently established the area, jumma, and rates of rent of the lands held by all the defendants; and that the receipts produced by the defendants did not show the quantity of land and the annual jumma thereof. He also held that no return under the Road Cess Act of 1871 was required to be made in respect of bhowli lands, there being no column set apart for such tenures in the printed forms; and he, therefore, dismissed the appeal.

The defendants appealed to the High Court.

Mr. *Twidale* and Baboo *Mohesh Chunder Chowdhry* for the appellants contended that s. 7 of Beng. Act X of 1871 debarred the plaintiff from recovering any rent in respect of the alleged bhowli tenure, inasmuch as the tenure was not included in the return lodged in pursuance of the Act; and that the Judge was wrong in holding that the receipt produced did not show the annual jumma.

Baboo *Bhowany Churn Dutt* for the respondent.

The judgment of the Court (MITTER and MACLEAN, JJ.) was delivered by

MITTER, J.—The plaintiff, who is the ticcadar of Mouza Malpore, brought this suit for arrears of rent for the year 1283. He alleged that the defendants held in that year 7 bigas 8 cottas 5 dhurs of land at a nukdi rent of Rs. 16-10$\frac{1}{2}$; 7 cottas 10 dhurs of land on which there were bamboo clumps, and the value of the landlord's share of the bamboos cut in the year was Rs. 51; and 18 bigas 5 cottas of bhowli lands, the value of the landlord's share of the putnee was Rs. 210 and odd. The plaintiff gave a deduction of Rs. 24 and odd annas as the amount paid by the defendants in that year.

The defendants denied holding any bhowli land, and alleged that they held a maurasi tenure in the village, the rent of which was Rs. 22-1-3, and that in this tenure the bamboo clumps mentioned in the plaint were included.

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The Munsif gave a decree in accordance with the allegations of the plaintiff, although he made some modification in the amount claimed. This decree has been confirmed by the District Judge. The defendants have preferred this appeal.

The defendants, in order to prove that their annual rent was Rs. 22-1-3, produced receipts for the previous years. The District Judge disposes of these receipts with the remark that they do not contain the quantity of land and the annual jumma of the defendants.

It has been contended before us that the District Judge is mistaken in thinking that the receipts do not show the annual jumma. We find that the contention is valid, because if they are genuine, they do show the annual jumma. But there was a question about their genuineness in the lower Courts, and the lower Appellate Court has expressed no opinion upon this point. But in the view which we take of the next objection urged before us, it becomes immaterial to inquire into the question of the genuineness of the receipts.

The next objection is, that the lower Courts are in error in awarding a decree for the rent of the bhowli lands, because, in the return which was made by the plaintiff to the Collector under the Road Cess Act (Beng. Act X of 1871), these lands were not included. It has been contended before us that the plaintiff is, upon this ground, precluded by s. 7 of the Road Cess Act of 1871 from recovering any rent on account of the alleged bhowli lands. The District Judge upon this point says, that it is generally understood that it is not necessary to enter the bhowli lands in the return, because there is no column in the form prescribed under Act X of 1871, in which such lands are to be entered.

We are of opinion that the opinion of the District Judge upon this point is contrary to the provisions of Beng. Act X of 1871. The form referred to by him is prescribed by s. 5 of the Act, which requires that the return should be made "of all lands comprised in an estate or tenure." The plaintiff was bound to enter in the column headed 'annual rent' the rent of all bhowli lands. The District Judge says that it was generally understood that the rents of the bhowli lands were

not required to be entered in the returns under Act X of 1871. But we find a clear direction for this insertion in the following extract from the rules framed by the Board of Revenue for the preparation of returns under Beng. Act X of 1871, Part II, Sched. A, part ii: "With reference to the manner in which uttbandee, bhowli, spunja, and bhag holdings, where rents are paid partly in money and partly in kind, or wholly in kind, should be entered in the return, it will be better for the zemindar to enter the cash value on an average of the receipts of the past two years, or if there have been no such receipts during that period, then at an approximate estimate of what he expects his portion of the crop to be worth to him at market rates, together with cash paid, if any, as rent."

We are of opinion that the plaintiff is precluded by s. 7 of Beng. Act X of 1871 from recovering any rent for the alleged bhowli lands. That being so, it is unnecessary to enquire whether the receipts filed by the defendants are genuine, because the plaintiff is only entitled to recover the nukdi rent claimed by him, which is less than what is admitted by the defendants. The plaintiff admits the receipt of Rs. 24 and odd annas in the year 1283, and as this is more than the nukdi rent claimed or admitted, the suit must be dismissed. We reverse the decrees of the lower Courts, and dismiss the plaintiff's suit with costs.

Appeal allowed.

Before Mr. Justice McDonell and Mr. Justice Field.

BANDEY KARIM AND OTHERS (JUDGMENT-DEBTORS) *v.* ROMESH CHUNDER BUNDOPADHYA AND ANOTHER (DECREE-HOLDER).*

1882
May 18.

Limitation—Application for Execution—Res judicata.

When a Court, upon an application for execution, has decided that the execution is barred by limitation, and that order has become final in consequence of no appeal having been preferred therefrom, such order will, upon a subsequent application for execution of the same decree, operate as a bar to execution.

* Appeal from Appellate Order, No. 42 of 1882, against the order of A. J. R. Bainbridge, Esq., Judge of Moorshedabad, dated the 13th December 1881, affirming the order of Baboo Hem Chunder Mitter, Second Munsif of Berhampore, dated the 22nd August 1881.

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BANDEY KAHIM v. ROMESH CHUNDER BUNDOPADHYA

Moonshee *Serajul Islam* for the appellants

Baboo *Doorgadass Dutt* for the respondents.

THE facts of this case sufficiently appear from the judgment of the Court (MCDONELL and FIELD, JJ.), which was delivered by

FIELD, J.—The question in this case is whether, when a Court, upon an application for execution, has decided that the execution is barred by limitation, and that order has become final in consequence of no appeal having been preferred therefrom, such order will, upon a subsequent application made for execution of the same decree, operate as a bar to execution. The facts of the present case are, that, on the 5th of March 1881, the Subordinate Judge made the following order: "It appears that the case is barred by limitation. The decree was passed on the 27th of July 1874, and this petition of execution states that an application for execution was made in 1878. Now it is clear that that application must have been made more than three years after the decree was passed. It is not shown that any step was taken to enforce the decree in the interval so as to save it from being barred by limitation. Case dismissed with costs." A review of this order was applied for on the 7th April 1881; and, on the 7th May 1881, the following order was passed:—"This is an application for review of an order disallowing an application for execution. The order disallowing sets out the grounds of refusal. This application does not set out any ground, save a vague and bold statement in explanation of laches all through from the representation of an incorrect application down to the disposal of it. I do not consider the creditor entitled to review of the order, and no case has been made for it. I disallow the application with costs." On the same date on which the review was applied for,—that is, the 7th of April 1881,—a fresh application for execution was presented, and the question which we have now to decide is whether this application of the 7th of April 1881 is barred by the order of the 5th of March 1881, which decided that the execution was barred by limitation, and against which no appeal was preferred. Both the lower Courts have decided this ques-

tion in the negative. They have proceeded upon the general ground that the principle of *res judicata* is not applicable to execution-proceedings. The question, whether the principle of *res judicata* is applicable to proceedings after decree, was discussed in the cases of *Harrosoondary Dassee* v. *Jugobundhoo Dutt* (1), *Rup Kuari* v. *Ram Kirpal Shukul* (2), and *Delhi and London Bank* v. *Orchard* (3). We do not, on the present occasion, propose to go into this broad, general, and probably difficult question, whether the principle of *res judicata* as enunciated in s. 13 of the Code of Civil Procedure applies in all its generality to proceedings after decree. We limit our decision to the exact question which is raised in the present case, and that is, whether the Court, having once decided that the execution is barred by limitation, that decision is a bar to further execution. We think that it is a bar. In the case of *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (4), a seventh application for execution was filed on the 22nd of September 1877, and the High Court held that this application for execution was barred, because the decree was barred when a previous application for execution was made on the 5th of September 1874. The Judges said:—"A decree once dead, no proceeding by means of an application out of time could revive it." Their Lordships of the Privy Council reversed this decision, and on this ground, that, on the 8th of October 1874, an order for attachment was made by the Subordinate Judge. The Privy Council said:—"That order was made by a Court having competent jurisdiction to try and determine whether the decree was barred by limitation. No appeal was preferred against it; it was acted upon, and the property sought to be sold under it was attached, and remained under attachment until the application for the sale now under consideration was made;" and further down, "the Subordinate Judge had jurisdiction, upon the petition of the 8th of October 1874, to determine whether the decree was barred on the 8th of October 1871, and he made an order that an attachment should issue. He, whether right or wrong, must be con-

(1) I. L. R., 6 Calc., 203.
(2) I. L. R., 3 All., 141.
(3) L. R., 4 I. A., 127; S. C., I. L. R., 3 Calc., 47.
(4) I. L. R., 3 Calc., 51, S. C., L. R., 3 I. A., 123.

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sidered to have determined that it was not barred. A Judge, in a suit upon a cause of action, is bound to dismiss the suit, or to decree for the defendant if it appears that the cause of action is barred by limitation. But if, instead of dismissing the suit, he decrees for the plaintiff, his decree is valid, unless reversed upon appeal; and the defendant cannot, upon an application to execute the decree, set up as an answer that the cause of action was barred by limitation." Now the present case is the converse of that case. If, in the present case the Subordinate Judge had decided, on the 5th of March 1881, that the decree was not barred by limitation, the judgment-debtor could not, upon the application of the 7th of April 1881, be heard to say that the decree was barred by limitation; and by the same course of reasoning, inasmuch as the Subordinate Judge decided on the 5th of March 1881 that the decree was then barred by limitation, and as that order has become final, the decree-holder cannot now, upon the application of the 7th of April 1881, be heard to say that it is not barred by limitation. Under these circumstances we must reverse the decree of the Courts below, and direct that the application for execution be dismissed.

The appellants will be entitled to their costs in both the Courts below

Appeal allowed.

Before Mr. Justice Maclean and Mr. Justice Macpherson.

1882 *June* 21.

RAM COOMAR SINGH AND ANOTHER (DEFENDANTS) *v.* KISHARI (PLAINTIFF) *

Registration Act (III of 1877), *s.* 17—*Kabuliat—Act XVI of* 1864, *s.* 13.

Neither s. 17 of Act III 1877, nor the similar sections of the preceding Acts, have the effect of rendering a document, which was not compulsorily registrable under Act XVI of 1864, inadmissible in evidence, under the succeeding Acts, without registration.

Baboo *Auhil Chunder Sen* for the appellants.

Baboo *Doorga Mohun Doss* for the respondent.

* Appeal from Appellate Decree, No. 2188 of 1880, against the decree of Baboo Mothoora Nath Gupto, Subordinate Judge of Chittagong, dated the 22nd June 1880, affirming the decree of Baboo Juggobundhoo Dutt, Sudder Munsif of that district, dated the 19th January 1880.

THE questions raised in this appeal are set out sufficiently for the purposes of this report in the judgment of the Court (MACLEAN and MACPHERSON, JJ.), which was delivered by

MACLEAN, J.—Two points have been urged in this appeal: the first is, that the kabuliat, which appears to have been executed in the month of May 1865, should not have been admitted in evidence (in a suit instituted in June 1881), as it was unregistered. The other point is, that rent has never been realized by the landlord under that kabuliat.

The contention on the first point is based on the language of s. 17 of Act III of 1877, which is to the effect that all documents mentioned therein shall be registered if they have been executed after the date on which Act XVI of 1864 and the other Registration Acts have come into force; and the effect which it is sought to give to that section is, that this lease of May 1865, having been executed after the date on which Act XVI of 1864 came into force, requires, under the Act of 1877, to be registered.

But it is beyond doubt that the document in question did not require registration when it was executed, for it was not until the Act of 1866 was passed that kabuliats or counterparts of leases were made compulsorily registrable.

The 17th section of the Act of 1866 contained language almost identical with the language of the 17th section of the present Act, so far as the point we are now considering is concerned. But we believe that it has never been held, that that section, or the similar section in any of the succeeding Acts, had the effect of rendering a document, which was not compulsorily registrable under the Act of 1864, inadmissible in evidence without registration under the succeeding Act.

We have been referred to the case of *Amjed Ali* v. *Ala Buksh* (1), in which the document under discussion was a kabuliat executed while the Act of 1864 was in force. The suit was brought in 1867, while the Act of 1866 was in force, and we cannot think that if the contention now raised by the learned vakil for the appellants had been considered tenable,

(1) 9 W. R., 537

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it would have been overlooked either by the learned vakils who conducted that case, or by the learned Judges who decided it.

Our own view is, that this section in the succeeding Acts from 1866 to the present date had not the effect of altering the character of a kabuliat executed before 1866 as admissible in evidence without registration.

The other point,—namely, that no rent has ever been asked for or paid under the kabuliat in this case,—is one which we think is of no force. The kabuliat is a distinct engagement to pay rent. The defendants contended in the Court below that they held on some tenure called a mokurari tenure. That was found against them, and the Subordinate Judge, sitting in appeal, has found, on the evidence of one of the defendants, that the appellant's predecessor and uncle actually paid rent by deductions from his salary. The contention that the kabuliat provided for payment in paddy, and that the deduction from salary must have been a deduction in cash, does not alter the fact that rent was paid. As to the argument that no rent was realized, that was a matter entirely in the option of the landlord for the time being.

The appeal must, therefore, fail. It is accordingly dismissed with costs.

Appeal dismissed.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Bose.

1882 *July* 12

SURJOKANT NUNDI (PLAINTIFF) *v* MOHESH CHUNDER DUTT AND OTHERS (DEFENDANTS) *

Hindu Law—Succession of Adopted Son of one Daughter and Natural Son of another—Grandfather's Estate.

The adopted son of one daughter shares equally with the natural son of another daughter in the inheritance left by his maternal grandfather.

Uma Sunker Mooro v. *Kali Komul Mozumdar* (1) followed.

IN this case the plaintiff alleged that his maternal grandfather, Gunga Prosad Dutt, was the owner of a four-anna

* Appeal from Appellate Decree, No 1409 of 1880, against the decree of T M. Kirkwood, Esq, Judge of Mymensingh, dated the 23rd April 1880, reversing the decree of Baboo Kedarnath Mozoomdar, Officiating Second Subordinate Judge of that District, dated the 12th February 1879.

(1) I. L R., 6 Calc, 256

share in certain lakhiraj lands, and that he died leaving two daughters, Bishnupria and Aradhoni, and two grandsons, the plaintiff and his brother, the sons of Bishnupria, and leaving also a widow Bishnupria (his second wife), and by her two daughters, Ishuri Dasi and Bhubuneshuri Dasi; that, on Gunga Prosad's death, the widow took possession of his property, during which Bishnupria and Aradhoni died, the widow shortly after died, leaving her married daughter Ishuri Dasi and her widowed daughter Bhuboneshuri, her surviving, as well as the plaintiff and his brother; that Ishuri Dasi then took possession to the exclusion of the widowed daughter, but died without issue in 1279, the brother of the plaintiff, however, predeceasing her; and that he, the plaintiff, thereupon put forward his claim as next heir, but was opposed by the defendant No. 1, who alleged himself to be the adopted son of Ishuri Dasi, and he therefore brought this present suit on the 6th April 1878, to recover possession of the four-anna share formerly belonging to Gunga Prosad.

The defendant No. 1 contended that Gunga Prosad died leaving a son named Kashi Nath as his heir, and that, on his death, Bishnupria (Gunga Prosad's widow) took possession as the successor to Kashi Nath, and that Bishnupria died leaving her surviving her daughters Ishuri Dasi and Bhuboneshuri, Bhuboneshuri, not however, being a widow at the date of the death of her mother Bishnupria, and that the husband of Ishuri Dasi and Ishuri duly adopted him as their son, and that his adopted father and himself successively had held adverse possession to the property for more than twelve years.

The Subordinate Judge found that the defendant was the duly adopted son of Ishuri Dasi, but that Gunga Prosad had no son named Kashi Kant; that Bhuboneshuri was a widow at the time of the death of her mother Bishnupria. He also found that Bishnupria inherited the property of her husband Gunga Prosad, and that as the plaintiff's mother predeceased the widow Bishnupria, Ishuri the married daughter was the only person who succeeded to Gunga Prosad's property after the death of Bishnupria, and as Ishuri died in 1279, the plaintiff's cause of action was within time, and holding that the plaintiff being the

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grandson of Gunga Prosad by his daughter, his claim to succeed to the property was preferable to the claims of the defendant No. 1, the adopted son of a daughter of Gunga Prosad, he decreed the suit in favour of the plaintiff.

The defendant appealed to the District Judge, who held, that the defendant No. 1, the adopted son, was entitled to share equally with the plaintiff in the properties of Gunga Prosad.

The plaintiff appealed to the High Court.

Baboo *Gurudas Banerjee* and Baboo *Prannath Pundit* for the appellant.

Baboo *Rashbehari Ghose* and Baboo *Lalmohun Dass* for the respondents.

The judgment of the Court (GARTH, C.J., and BOSE, J.), was delivered by

GARTH, C.J.—In this case we think it right to follow what we understand to be the rule laid down by the Full Bench in the case of *Uma Sunker Moitro* v. *Kali Komul Mozumdar* (1).

We find no special text or rule laid down in the books applicable to this case; and we, therefore, hold that the adopted son of a daughter shares equally with a natural son the inheritance left by his maternal grandfather. The lower Court's view is, therefore, correct.

The appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Prinsep and Mr. Justice Field.

1882 *June 5.*

DWARKANATH (PLAINTIFF) *v.* BABURAM LASKAR (DEFENDANT)

Landlord and Tenant—Suit for Rent—Contract to pay for Excess Land after Measurement—Notice—Rent Act (Beng. Act VIII of 1869), *s.* 14.

When a tenant contracts to pay rent at a certain rate for any such land as upon measurement may be found to be in excess of the estimated area, it is not necessary to serve him with notice under s. 14 of the Rent Act before instituting a suit for the rent of any additional land, nor is it necessary that he should be present at the measurement.

Appeal from Appellate Decree, No. 2460 of 1880, against the decree of W. H. Page, Esq., Officiating Additional Judge of the 24-Parganas, dated the 20th September 1880, reversing the decree of Moulvi Abdul Hamid, Officiating Munsif of Baraipore, dated the 2nd March 1880.

(1) I. L. R., 6 Calc., 256.

IN a suit for arrears of rent, road cess, and public work cess, it appeared that the defendant held his land on a maurasi and mokurari tenure, and that, in the kabuliat, the defendant agreed that, in case the lands mentioned therein were surveyed, and the quantity of such lands found increased, he would pay rent for the lands so found to have increased. The land had been measured and found to contain twenty-four bighas ten cottas. The defendant contended that he only held fourteen bighas, and that the land was not measured in his presence. The Munsif gave the plaintiff a decree for the whole amount claimed. The District Judge considered, on the authority of *Thekmee Beldar* v. *Ram Kishen Lall* (1), that the suit was in substance a suit for rent at an enhanced rate; that notice was necessary; and accordingly reversed the Munsif's decision. The plaintiff appealed to the High Court.

Baboo *Issur Chunder Chuckerbutty* and Baboo *Pran Nath Pundit* for the appellant.

No one appeared for the respondent.

The following judgments were delivered:—

PRINSEP, J.—The District Judge has dismissed this suit, on the ground that this was a suit for enhancement, and no notice required by s. 14 of the Rent Law had been served. It appears to us that the terms of the contract between the parties, under which the tenancy of the defendant was created, dispenses with the necessity for such notice. The case is precisely similar to that decided by a Division Bench of this Court, consisting of Morris, J., and myself, in Appeal No. 759 of 1878. In that judgment we expressed ourselves to the following effect:—"There is no provision as to the necessity of previous notice or even to the presence of the tenant at the time of measurement. The tenant unreservedly stipulates to pay at a certain rate per kani for any such land as upon measurement may be found to be in excess of the estimated area.

(1) 15 W. R., 71.

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Under the contract the time of discovery of the excess land by means of measurement is the moment from which he engages to pay additional rent for such excess land. The view thus taken that the special terms of the ryot's kabuliat dispenses with the necessity of a notice in terms of the Rent Law is in accordance with the judgment of a Division Bench of this Court in *Ram Narain Lall* v. *Gumbeer Singh* (1)." In accordance with the precedent of that decision, we set aside the judgment of the lower Appellate Court, and restore that of the first Court. The plaintiff will receive the costs of this Court and of the lower Appellate Court.

FIELD, J.—I concur. I think that this case is not similar to the case of *Thekmee Beldar* v. *Ram Kishen Lall* (2), upon which the District Judge relies. In that case there was no express agreement to pay additional rent for additional land. Nor is this case precisely similar to the Full Bench case of *Nistarini Dasi* v. *Bonomali Chatterji* (3). It is similar to Special Appeal, No. 759 of 1878, referred to by Prinsep, J In that case the patta or kabuliat was for a term of ten years, in the present case it is a maurasi kabuliat. Now, a maurasi lease is, according to the custom of this country, a permanent lease. It appears to me, therefore, that the written engagment in this case does, by necessary implication, specify the period of such engagement, and that the provisions of s. 15 of the Rent Law requiring a notice do not apply.

Appeal allowed.

(1) 19 W. R., 108. (2) 15 W. R., 71.
(3) I. L. R., 4 Calc., 941.

Before Mr Justice McDonell and Mr. Justice Field.

JAGGAMONI DASI (PLAINTIFF) *v* NILMONI GHOSAL AND ANOTHER (DEFENDANTS).*

1882
July 13

Right of Suit—Injunction—Property dedicated to Religious Purposes—Suit to restrain its use for other purposes.

The plaintiff's ancestor built a temple, a bathing-ghat, a room called 'Gungajatri ghur,' and a ghat close to it, to which persons on the point of death were removed, and certain ceremonies were performed The defendants used the last mentioned ghat for the purpose of landing goods.

Held, that if, when the plaintiff's ancestor erected the buildings, he intended to grant to the Hindu community merely a right of easement over the property, and not to transfer the ownership therein to the community, the plaintiff was entitled to maintain a suit to restrain defendants from using the ghat for trading purposes.

Mr. *Henderson* and Baboo *Saroda Churn Mitter* for the appellant.

Baboo *Gurudas Banerjee* for the respondents.

The facts of this case sufficiently appear from the judgment of the Court (McDONELL and FIELD, JJ.), which was delivered by

FIELD, J.—The plaintiff in this case makes the following allegations in her plaint: that her father, the late Gunga Narain Dutt, purchased certain brohmutter land on the bank of the river Hooghly, and during his lifetime built thereon certain *mundirs*, or temples, dedicated to Ishwar Siva, a bathing-ghat, and a room called gungajatri-ghur, and close thereto another ghat, called an *antorjoli*-ghat, about six feet in breadth; that, ever since the above ghat was built, sick persons, who have lost all hopes of recovery, have been brought to the aforesaid gungajatri-ghur, and, when on the point of death, have been removed to the said ghat, where the rites of *antorjoli* have been performed according to practice and the Hindu Shastras;

Appeal from Appellate Decree, No. 468 of 1881, against the decree of J F. Browne, Esq., Officiating Judge of the 24-Parganas, dated the 28th December 1880, reversing the decree of Baboo Dwarkanath Mitter, Munsif of Sealdah, dated the 24th February 1880.

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JAGGAMONI DASI v. NILMONI GHOSAL.

that the plaintiff is her father's executrix and the manager of his property; that the defendants have recently used the ghat for the purpose of landing goods from their boats; that, in consequence of their doing so, the sick persons brought to the river-side have been subjected to annoyance, and the object with which the ghat was built has been frustrated. The plaintiff, therefore, asks the Court to declare that the ghat was intended and dedicated for the purposes already mentioned; and further asks that the defendants be restrained from using such ghat for the purpose of loading and unloading articles of trade.

The Munsif gave the plaintiff a decree. There was then an appeal to the District Judge of the 24-Parganas, who was of opinion that the plaintiff is not entitled to maintain this suit. He says:—"It is quite clear that the plaintiff cannot claim exclusive possession, as the ghat is a public *antorjoli*-ghat, intended for the celebration of the *antorjoli* ceremony by dying persons of the Hindu persuasion. The proper course for the plaintiff to adopt is to bring to the notice of the Magistrate that the defendants, by carrying on the occupation of landing goods at a public ghat intended only for *antorjoli* purposes, have interfered with the comfort of those members of the community who are entitled to use the ghat for a particular purpose. The Magistrate then, if he concur in the finding on facts arrived at by the Munsif in his very careful judgment, will be in a position to take action against the defendants under the provisions of s. 521 of the Criminal Procedure Code."

It is now contended before us that the District Judge is in error in holding that the plaintiff is not entitled to maintain this suit; and it appears to us, for reasons which we are about to state, that this contention is correct. An application for an injunction must be made by a person who has a sufficient interest in the subject-matter, and the question then arises whether the plaintiff has a sufficient interest in the subject-matter of this suit. There is here no deed of endowment, and no evidence has been taken as to the exact purpose and object of this so-called endowment. The first question which suggests itself is whether the plaintiff's father, in building these temples, this *antorjoli* room, and this ghat, intended to give to the Hindu

community a right of easement over the soil, or intended to transfer the ownership of the buildings as well as the ownership of the soil to such community. It by no means necessarily follows that, because the plaintiff's father erected this ghat and this *antorjoli*-room, and allowed the Hindu community to use them for the purposes set out in the plaint, he intended to divest himself of the ownership of the soil, &c. In the case of *Lade* v. *Shepherd* (1) the plaintiff had built upon his own property a street which had ever since been used as a highway. The defendant, who had land contiguous thereto and separated therefrom only by a ditch, made a bridge over this ditch, the end of which bridge rested on the highway. The plaintiff brought an action of trespass against the defendant, and it was insisted for the defendant that, by the plaintiff's making this street, there was a dedication of it to the public, and therefore, however, he might be liable to an indictment for nuisance, yet the plaintiff could not sue him as for a trespass on his private property. It was held that the dedication was to the public, so far as the public had occasion for it, which was only for a right of passage, but that it was never understood to be a transfer of the absolute property in the soil. So in the present case it might be said that there was a dedication to the public, so far as the public had occasion, to use this ghat and this room for the purposes set out in the plaint; but that it never was understood to be a transfer of the absolute property in the soil. The case just cited has been referred to as an authority in the more recent case of *St. Mary Newington* v. *Jacobs* (2). In the case now before us there is no suggestion that any sevait was appointed; and this being so, the donor,—that is, the plaintiff's father,—would, according to Hindu law, be the sevait. If a sevait had been appointed it might be said that the ownership of the soil had been transferred to such sevait, but inasmuch as it does not appear that any sevait was appointed, it may well be reasonable to suppose that the ownership in the soil continued in the plaintiff's father. A case has been referred to—the case of *Baroda Prasad Mostafi* v. *Gora Chand Mostafi* (3); that

(1) 2 Str., 1004. (2) L. R., 7 Q. B., 47.
(3) 3 B. L. R., A. C., 295; S. C., 12 W. R., 160.

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was a suit for obstructing a public road Peacock, C J, said:—"The plaintiff sues defendant for obstructing a public road, without showing that he has sustained any particular inconvenience in consequence of that obstruction If he can maintain this suit, any member of the public can do so, and the defendant may be ruined by innumerable actions by persons who have not sustained a farthing of damages It is said that the plaintiff has a right to sue, because he was one of the persons who dedicated the road to the public, but it is not because he gave the road to the public that he is necessarily entitled to be the guardian of the public and to sue whenever there is any obstruction to the public which causes him no inconvenience beyond that which is sustained by every other member of the public" The learned Chief Justice then proceeded to point out that there was a sufficient remedy provided by s 308 and the following sections of the then Code of Criminal Procedure, Act XXV of 1861. Similar provisions are now to be found in s 521 of the present Code of Criminal Procedure Now we think that it is not possible in this case to say that this ghat and this room were public thoroughfares or public places within the meaning of s. 521 The dedication, if dedication there were, was not for the use of the whole public but for the use of a particular community, a particular portion of that public,—that is, persons professing the Hindu religion, and, in a more restricted way, for such members of that community as are at the point of death In this view it appears to us that the case before us is to be distinguished from the case of *Baroda Prasad Mostafi* v *Gouachand Moostafi* (1), and we may further observe that, in that case, no question was raised as to the ownership of the soil, and no reference was made to the class of cases of which *Lade* v *Shepherd* (2) may be taken to be an example In this view it appears to us that the first question which arises in this case is whether the plaintiff's father, when he erected these rooms and this ghat, intended to grant to the Hindu community merely a right of easement over this property, or to transfer the ownership in the ghat and the soil to that community If it be found that there was no

(1) 3 B L R, A C, 295, S C, 12 W R, 160 (2) 2 Str, 1004

intention in the donor to transfer the property in the soil, there can be no doubt that the plaintiff is entitled to maintain the present suit. But we think that even if it be found that there was a dedication, the effect of which was to transfer the ownership in the soil to the Hindu community, the plaintiff, as the representative of the donor, may well be entitled to maintain the present suit, there being apparently no sevait or trustee; and the object of the suit being, not to resume the grant, but to effectuate the intention of the grantor by preserving the property to the uses for which he presumably granted it.

We must, therefore, set aside the decree of the Court below and remand the case for decision upon the merits, with reference to the observations which we have made in this judgment. The costs of this appeal and of the Courts below will abide the ultimate result.

Case remanded.

Before Mr. Justice White and Mr. Justice Macpherson.

ISSUR CHUNDER DOSS (PLAINTIFF) *v.* JUGGUT CHUNDER SHAHA AND OTHERS (DEFENDANTS).*

1882
April 21.

Limitation Act (XV of 1877), sched. ii, arts. 49 and 123—Suit for Specific Moveable Property—Suit for a Legacy.

A testator bequeathed certain specific moveable property to *A*. *B* applied for and obtained a certificate under Act XXVII of 1860 on behalf of the testator's widow, and took possession of the property bequeathed. *A* appealed, and the case was remanded for retrial. On the 27th of March 1873, the former order was cancelled and a certificate was granted to *A* On the 19th of August 1873, *B* was directed to deliver up the property to *C*, who had purchased it from *A*. On the 22nd of March 1878, *C* instituted a suit to recover the property.

Held. that the suit was barred under art. 49 of the Limitation Act.

Article 123 of the Limitation Act only applies to cases in which the property sought to be recovered is not only a legacy but is also sought to be recovered as such from a person who is bound by law to pay such legacy, either because he is the executor of the will or otherwise represents the estate of the testator.

* Appeal from Appellate Decree, No. 1118 of 1880, against the decree of W. F. Mores, Esq., Officiating Judge of Tippera, dated the 5th April 1880, affirming the decree of Baboo Kali Dass Dutt, Second Subordinate Judge of that district, dated the 23rd November 1878.

1882

ISSUR CHUNDER DOSS v. JUGGUT CHUNDER SHAHA.

By his will, dated the 29th Cheit 1277 (11th April 1871), one Kasi Chunder Shaha bequeathed all his property, both moveable and immoveable, to one Juggut Chunder Roy. Kasi Chunder Shah died on the 5th Bysack 1278 (17th April 1871), and an inventory of his property was prepared under Act XIX of 1841.

One Chunder Moni Shaha, the brother of Alladmoni, the widow of Kasi Chunder, applied for a certificate on her behalf under Act XXVII of 1860. Juggut Chunder objected, but an order granting a certificate was made upon security being furnished. Two persons, named Mothur Mohun Poddar and Rai Chand Poddar, became sureties under a bond, dated the 17th Srabun 1278 (1st August 1871), by which they pledged certain immoveable property. Chunder Moni then obtained possession of all Kasi Chunder's property. Juggut Chunder appealed to the High Court against the order granting the certificate, and the case was remanded for retrial. On the 27th of March 1873, the District Judge cancelled his former order and granted a certificate to Juggut Chunder; and on the 19th of August made an order directing Chunder Moni to deliver up Kasi Chunder's properties to the plaintiff, who had purchased them from Juggut Chunder on the 5th Kartic 1282 (21st August 1875). On the 22nd of March 1878, the plaintiff instituted the present suit against Chunder Moni, Mothur Mohun, Rai Chand and Juggut Chunder, to recover the properties left by Kasi Chunder (which consisted of moveable properties only), and for a declaration that the properties pledged by Mothur Mohun and Rai Chand were liable for his claim.

The Subordinate Judge dismissed the suit, holding that it was barred under art. 49 of the Limitation Act, and the decision was upheld by the District Judge.

The plaintiff appealed to the High Court.

Baboo *Doorga Mohun Doss* and Baboo *Okhii Chunder Sen* for the appellant.

Mr. *Evans*, Baboo *Chunder Madhub Ghose*, and Baboo *Boykant Nath Dass* for the respondents.

The judgment of the Court (WHITE and MACPHERSON, JJ.) was delivered by

WHITE, J.—The lower Appellate Court has decided the question of limitation correctly, and has correctly applied art. 49 of the second schedule of the Limitation Act. It appears that the specific property sought to be recovered is specific moveable property, and came into the possession of Chunder Moni Shaha, the first defendant, in the year 1871, under an order of Court, which directed that he should hold that property on giving security subject to the order of the Court. On the 19th August 1873, the same Court ordered that he should deliver up the property to the plaintiff or his vendor. This order he disobeyed. Up to the date of this order, it may be taken that his detention of the property was lawful. But from the moment the latter order was made, his possession of the property became unlawful. Article 49 says, that in a suit for specific moveable property the period of limitation is three years running or commencing from the time that the obtainer's possession became unlawful. The present suit, therefore, comes strictly within that article, and not having been brought until the 22nd of March 1878, is clearly barred.

It is contended that art. 123, which provides twelve years for the receiving of a legacy, is applicable, because this specific property was originally bequeathed to the plaintiff's vendor under a will. But the answer to this argument is, that the property to which this suit relates is not sought to be recovered as a legacy, but as property which belongs to the plaintiff, and has been unlawfully detained by the defendant No. 1. Article 123 only applies to cases in which the property sought to be recovered is not only a legacy, but is also sought to be recovered as such from a person who is bound by law to pay such legacy, either because he is the executor of the will or otherwise represents the estate of the testator.

We dismiss the appeal with costs.

Appeal dismissed.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Miller, Mr. Justice Wilson, Mr. Justice Tottenham, and Mr. Justice Maclean.

1882
July 11

PROKASH CHUNDER DASS (DEFENDANT) *v.* TARACHAND DASS AND OTHERS (PLAINTIFFS).*

Registration Acts (VIII of 1871 *and III of* 1877)—*Sale-Certificates, Registration of—Construction of Act—Maxim "Optimus legis interpres consuetudo."*

Sale-certificates granted under the provisions of s. 259 of Act VIII of 1859 are not documents the registration of which is compulsory under the provisions of s. 17 of the Registration Act of 1871.

THIS was a reference to a Full Bench by McDONELL and FIELD, JJ.

The question referred was, whether a sale-certificate, dated the 23rd June 1873, and granted under the provisions of s. 259 of Act VIII of 1859, is a document of which the registration is compulsory under the provisions of s. 17 of the Registration Act (VIII of 1871).

Mr. *Branson*, Baboo *Kali Mohun Doss*, and Baboo *Bussunt Coomar Bose* for the appellant.

Mr. *Branson*.—The question here is between the auction-purchaser and a third party. I contend that a sale-certificate cannot be admitted in evidence unless it is registered. According to the reported cases, a sale-certificate under the Act of 1859 does require registration, and there appears to be only one case in which it has been held that registration was unnecessary, and that is in an unreported case—*In the matter of Srinath Banerjee* (1), decided by Prinsep and Morris, JJ.—The case of *Benodi Lal Ghose* v. *Tamizuddin* (2) did not in

* Full Bench Reference made by Mr. Justice McDonell and Mr. Justice Field, dated the 10th March 1882, in appeal from Original Decree, No. 233 of 1880

(1) Rule No 1277 of 1879 (2) 7 C. L. R., 115.

words decide that registration of sale-certificates was necessary; but the Court admitted, for the sake of argument, that it was necessary whilst deciding the case on other grounds. The cases which show that a certificate of sale must be registered are, an extra-judicial ruling of the Madras High Court (1), *Srinivasa Sastri* v. *Seshay Yangar* (2), *Mulji Bechar* v. *Anupram Bechar* (3), *Pandhu Malhari* v. *Rakhmabai* (4), *Lalbhai Lakhmidas* v. *Naval Mir Kamuludin Husen* (5), *In the matter of Khaja Patthanji* (6), *Ichharam Kalidas* v. *Govindram Bhowani Shankar* (7), and *Karan Singh* v. *Ramlal* (8). [GARTH, C. J.—If a purchaser at an auction-sale before taking out his certificate, brought a suit against his judgment-debtor for possession, would not a decree obtained in that suit be sufficient evidence of his title?] Perhaps as between the parties to the suit, but certainly not as between the judgment-creditor and third parties. The case of *Harkisandas Narandas* v. *Bai Ichha* (9) lays down that a purchaser shall have no remedy against his judgment-debtor unless he has obtained a certificate of sale; and the case of *Basapa* v. *Marya* (10) lays down that a purchaser at a sale cannot apply to the Court for possession before obtaining a certificate. The case of *Mulji Bechar* v. *Anupram Bechar* (3), decided in November 1870, whilst Act XX of 1866 was in force, which required sale-certificates to be registered, and required the Court to send notice also to the Registry Office, was the first case in the Bombay Courts which decided that sale-certificates should be registered. In the next Registration Act (VIII of 1871), s. 42 of the old Act was omitted, and the question then again came before the Courts, and the extra-judicial decision reported in 6 Madras High Court Reports, App., xxxix, and decided on the 8th September 1872, was to the effect that registration was necessary. The question was again raised in the case of *Pandhu Malhari* v. *Rakhmabai* (4), and a like decision come to; and again, in 1875,

(1) 6 Mad. H. C. Rep., App, xxxix
(2) I. L. R, 3 Mad, 37.
(3) 7 Bom H. C., A. C., 136, 137.
(4) 10 Bom H. C., 433.
(5) 12 Bom H. C, 247.
(6) I. L. R., 5 Bom., 202.
(7) I. L R, 5 Bom., 653.
(8) I. L. R., 2 All., 96.
(9) I. L R, 4 Bom., 155.
(10) I. L. R., 3 Bom., 433.

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in the case of *Panha Khumaji* v. *Futta Upaji* (1), it was held that the registration of sale-certificates was optional. Then Act III of 1877 was passed: that Act had no clause directing the Court to send notice to the Registry Office, but this clause was added by s. 107 of Act XII of 1879. Act X of 1877, in s. 316, omits the words which are the basis of the decisions of the Bombay Courts; the present case falls under the old Code. Then in point of time comes the case of *Ichharam Kalidas* v. *Govindram Bhowani Shankar* (2), decided on the 21st September 1881, which incidentally decided that sale-certificates are compulsorily registrable. [GARTH, C. J.—We know the Bombay cases are all to that effect, but it becomes a question whether we in Bengal should follow them, inasmuch as if we did so we should upset innumerable titles, which have been thought to be safe for a very long period back.] There are also the cases of *Kanahia Lal* v. *Kalidin* (3) and *Srinivasa Sastri* v. *Seshay Yangar* (4), which decide that certificates of sale must be registered. The maxim *optimus legis interpres consuetudo* will not help the matter. For where a Statute, speaking on some points, is silent as to others, usage may well supply the defect, especially if it is not inconsistent with the statutory directions where any are given; or where the Statute uses a language of doubtful import, those acting under it for a long course of years may well give an interpretation to that meaning. But usage can be binding only as affording contemporary interpretation.—See *Magistrate of Dunbar* v. *Duchess of Roxburghe* (5).

Mr. *Evans*, Baboo *Bama Churn Banerjee*, and Baboo *Joy Gobind Shome* for the respondents.

Mr. *Evans*. — To hold that sale-certificates require registration, would be to upset the rule of unwritten law which has been in force in the Courts in Bengal for many years. That such certificates do not come under s. 17 of the Registration Act, was clearly the opinion of the Inspector-General of Regis-

(1) 12 Bom. H. C., 179
(2) I. L. R., 5 Bom., 653.
(3) I. L. R., 2 All., 392.
(4) I. L. R., 3 Mad., 37.
(5) 3 Cl. & F., 354.

tration; see Stephens on Registration, p. 12. The case of *Morecock* v. *Dickins* (1) shows that the Court will not upset a practice; and in *Thumbusawmy Moodelly* v. *Hossain Rowthen* (2), where from the year 1858 the Madras Presidency, and from 1864 the Bombay Presidency, had erroneously, in contravention of the law of India as declared by the earlier decision, adopted, with regard to mortgages by conditional sale, doctrines which the English Courts of Equity had applied to mortgages in England, the Judicial Committee expressed a doubt as to whether they should follow the earlier decisions, which appeared sound, or the new course of decision that had sprung up in Madras and Bombay, which appeared unsound. A sale-certificate is not 'an instrument' within the meaning of cl. 2, s. 17 of Act VIII of 1871; it is not an instrument executed by the parties within the meaning of the section. As sale-certificates are not regarded by the Stamp Act as conveyances, this shows an intention on the part of the Legislature not to look upon them as instruments *inter partes* requiring registration. The case referred by the Board of Revenue, No. 2 of 1875 (3), shows the *ratio decidendi* in the case reported in 6 Mad. H. C. Ruling, App., xxcix. It was only the peculiar words in s. 259 of Act VIII of 1859, which were the grounds of the decision. Act VIII of 1859 is a Procedure Act; and when therein a document is said to be taken and deemed to be a transfer, it merely means that it is a transfer for the purpose of the procedure of the Court. The case of *Mussamut Buhuns Koonwar* v. *Lalla Buhoree Lall* (4) has decided that the possessor of a sale-certificate, who is in possession, is in such a strong position that, under s. 260 of Act VIII of 1859, he can hold the property against any suit brought against him. *Doorga Naram Sen* v. *Baney Madhub Mozoomdar* (5) pointed out that the words of s. 259 do not contemplate that nothing would pass to a purchaser at a sale by the Court unless a certificate were issued; and that the order would be sufficient to pass the title, the certificate being merely evidence that the

(1) 2 Amb. Rep., 681.
(2) I. L. R., 1 Mad., 1.
(3) 8 Mad. H. C., 112.
(4) 10 B. L. R., 159.
(5) I. L. R., 7 Calc., 199.

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property so passed; if this is so, a certificate cannot be called an instrument under which the transfer was made. *Abdool Azis Biswas* v. *Radha Kanto Kobiraj* (1) is a case as to the registration of a certificate under Reg. VIII of 1819, but it raises a query whether a sale-certificate under Act VIII of 1859 requires registration or no. Certificates of sale would never have been taken to fall within s. 17 of the Registration Act, except for the purview of s. 259 of the Code. Is there any compulsion in these words in s. 259?

The opinion of the Full Bench was delivered by

GARTH, C. J.—If we were called upon to decide this question merely upon the language of the Registration Act of 1871 and the Code of 1859, and without regard to the practice which has prevailed in this province, it is possible that we might take the same view of it as the other High Courts, or at any rate, out of respect for their opinion, we should not adopt a contrary view without considerable reluctance.

But, in point of fact, we are now asked to put a construction upon these Acts with reference to the registration of sale-certificates, which is directly at variance with that which has been recognized and acted upon by the people of Bengal for many years past. We are not aware of a single instance in which this Court has held that such certificates ought to be registered; whilst, on the other hand, both on the Appellate and on the Original Sides of the Court, such instruments have been admitted in evidence without registration.

And this practice moreover appears to have received the sanction of the Government of Bengal from a very early period.

In a letter written by Mr. Secretary Eden to the Inspector-General of Registration, on the 19th of September 1868, the Government laid it down as an instruction to Registration Officers, that certificates given on sales for arrears of revenue did not require registration. It is stated in that letter, that such instruments did not come under s. 17 of the Registration Act; and that if they come within that Act at all, it

(1) I. L. R., 5 Calc., 226.

was under s. 42, which requires the Court, and not the parties, to register the instrument.

These certificates were, of course, of much of the same nature as certificates under sales in execution; and we believe that, upon the strength of this authority, and the practice which has prevailed in accordance with it, many thousands of purchasers at execution-sales have omitted to register their sale-certificates in the belief that they were acting in accordance with the law; and if we were now to hold that registration was necessary, the consequences would be most unjust and disastrous.

We think, therefore, that, in this instance, we may very properly act upon the well-known legal maxim "*optimus legis interpres consuetudo.*" When a legislative measure of doubtful meaning has, for several years, received an interpretation, which has generally been acted upon by the public, Courts of Justice should be very unwilling to change that interpretation, unless they see cogent reasons for doing so. And this argument, of course, applies more strongly where, as in the present case, the measure relates not to any general principle of law, but to some technical or fiscal rule, such as the registration of documents, and where the interpretation which has been put upon the measure is in ease of the general public.

There is undoubtedly much force in the remarks of Mr. Justice Field in the last paragraph of the reference which we are now answering, that the two main objects of registration,—namely, the authentication of documents, and the publicity given to dealings in land,—are both, to a great extent, unnecessary in the case of sale-certificates.

And the result of recent legislation has been to show, either that the Government of India never intended these certificates to be registered, or that, having intended it, they have now found reason to change their minds.

In the Civil Procedure Code of 1877, s. 316, which provides for certificates of sale being given, the words in the former Code are omitted, that "the certificate shall operate as a transfer." Then, by the Registration Act of the same year, provision is made in s. 89, that such instruments shall be registered

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by the Courts, and not by the parties. And lastly, by the Transfer of Property Act (s. 2, sub-section *d*), the provisions which make registration necessary are not to extend to "any transfer in execution of a decree of a Court of competent jurisdiction."

We think it right, for these reasons, to answer the question which has been referred to us, in the negative.

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Maclean.

1882 *March* 24.

DULI CHAND AND OTHERS (PLAINTIFFS) *v.* RAJKISSORE (DEFENDANT).

Mokurari Lease—Covenant to forfeit Lease if Rent be Unpaid—Payment of Rent after Suit but before Decree—Relief against Forfeiture—Beng. Act VIII of 1869, *s.* 52.

Section 52 of Beng Act VIII of 1869 is applicable both to cases where the right to cancel a lease arises under the provisions of the Act, and to cases where the right arises under agreement between the parties.

But, the object of the section being to prevent a forfeiture, if the rent be paid within the time specified by the section, the Courts will grant relief against a forfeiture where the rent is so paid.

THIS was a suit brought to cancel a mokurari lease under s. 52 of Beng. Act VIII of 1869, and for the payment of certain arrears of rent. It appeared that twelve annas of a certain mauza had been leased out in 1263 (1856) to the defendant under a mokurari patta by Ram Imaman and Mussamut Bhatto, the proprietors of the mauza, at an annual jama of Rs. 2,022, out of which the defendant was to pay as Government revenue Rs. 668-1-6, and the balance to the proprietors; the mokurari being granted on payment of Rs. 3,750 as nuzarana. The lease contained a stipulation that if the mokurarjdar and her heirs failed to pay the mokurari rent for any year in full, then the proprietors should have the power to deduct the rent due from

Appeal from Original Decree, No. 289 of 1880, against the decree of Babou Matadin, Subordinate Judge of Gya, dated the 13th July 1880.

the nuzarana-money, and, after payment of the balance of the nuzarana-money to the mokurarridar, to cancel the mokurari lease and take seer possession of the land leased.

The proprietors of the land sold twelve annas of the mauza leased as aforesaid to Ram Rutton Neoghi, under a kobala dated the 11th of January 1871; and on the 15th of September 1873, the right and interest of Ram Rutton Neoghi was sold by auction and purchased by one Dindyal Lal (a deceased brother of the plaintiffs) in satisfaction of a decree obtained by Dindyal Lal against Ram Rutton Neoghi.

Dindyal Lal brought two suits against the defendant for arrears of rent; and, on the 13th of April 1875 and the 30th of May 1877, obtained decrees against her. On the latter of these decrees nothing had been paid.

Dindyal died on the 8th of March 1878, and his widow relinquished her life-interest in the property to the brothers of Dindyal, the plaintiffs.

The plaintiffs then served the defendant with the following notice:—"Please deduct Rs. 3,750, the nuzarana-money of the mokurari property, from the arrears of rent and decretal-money, which are still due by you, or receive in cash Rs. 619-1-3, which forms the balance of the nuzarana-money after the deduction of the rent, and give up possession of the said mouza. We shall take seer possession and collect the rent." On the 21st Jait 1286 F. (27th May 1879), the defendant refused to comply with their demands, and the plaintiffs, thereupon, on the 9th of June 1879, brought the suit for the purposes above stated.

The defendant admitted the mokurari lease, but contended that she had paid the Government revenue, and that this should, therefore, be deducted from the annual jama, and claimed the benefit of s. 52, Beng. Act VIII of 1869; and stated that, on the 10th of June 1879, she had deposited the rent for the years in dispute under ss. 46 and 47 of Act VIII of 1869; and had further, on the 20th of June 1879, deposited in Court the decretal money due; and further contended that as the mokurari lease was descendible to children, and she only had a life-interest in it, the claim to have the lease cancelled was not good.

The Subordinate Judge held that the mokurari could not be

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cancelled, as the amount of rent due at the time of suit was paid in full after the institution of the suit and before decision; and dismissed the suit, each party bearing their own costs.

The plaintiffs appealed to the High Court.

Mr. *C. Gregory* and Baboo *Amarendra Nath Chatterjee* for the appellants.

Baboo *Kali Mohun Dass* and Baboo *Kashi Kant Sen* for the respondent.

The judgment of the Court (MITTER and MACLEAN, JJ.) was delivered by

MITTER, J.—This suit was brought by the plaintiffs for the cancellation of a mokurari lease. It was based upon the terms of the mokurari lease. These terms are to the following effect:—"If the said mokuraridar and her heirs fail to pay the mokurari rent for any year in full, then we, the proprietors, and our heirs, shall have the power to deduct the rent due to us from the nuzarana-money, and after paying the balance of the nuzarana-money to the mokuraridar and her heirs, and cancelling the mokurari patta, take seer possession of the share in the said mauza." It was stated in the plaint that, for seven successive years, this condition of the lease was broken, and the full amount of rent for each of these years remained in arrear at the end of each year; that the plaintiffs' predecessor in title obtained a decree for rent on the 31st May 1877, which, up to date of suit, had not been satisfied. That decree was for Rs. 4,444-5-4. The prayers of the plaint were: *first*, that the mokurari patta may be cancelled and set aside; *secondly*, that, after deducting Rs. 3,130-14-3, the principal amount of the arrears of rent, the balance, Rs. 619-1-9, of the nuzarana-money be awarded to the defendant, or that the plaintiff be declared to be at liberty to deposit the said money in Court after deducting the total amount covered by the decree for arrears of rent due to the plaintiffs from the defendant, or that any other order as the Court think proper may be passed on the subject; and *thirdly*, that, by dismissing the defendant, the plaintiffs may be put in seer possession of the property. It appears that, after the

suit was instituted, the defendant satisfied the decree of the 31st May 1877 by depositing the money due under it into Court. In this state of facts the lower Court, under the provisions of s. 52 of Beng. Act VIII of 1869, dismissed the plaintiffs' suit for the cancellation of the lease. It is contended before us in the first place that the provisions of s. 52 would not apply, because that section only refers to suits for the cancellation of leases which may be brought by the landlord under the provisions of the Rent Act for the cancellation of leases. Now this question came up before the Judicial Committee of the Privy Council in the case of *Duli Chand* v. *Meher Chand Sahu* (1). That was also a suit by a landlord to cancel a mokurari lease in pursuance of a similar agreement contained in the lease. The Court of first instance found in favour of the landlord upon the question of non-payment of rent, but dismissed the claim for cancellation upon the ground that the claim was barred by limitation. The High Court set aside the decree of the lower Court with reference to the claim for the cancellation of the lease, and awarded a decree in terms of s. 78, Act X of 1859. (Section 52 of Act VIII of 1869 is word for word the same as s. 78 of Act X of 1859.) Against the decree of the High Court the landlord appealed, contending that he was entitled to a decree declaring the lease to be unconditionally cancelled. The Judicial Committee observed that it was contended before them that "the latter part of s. 78 only applied to cases where the statutory power was given by this Act to cancel leases, and not to cases where the right to cancellation accrued in consequence of covenants in the lease itself. But their Lordships are of opinion that that would be placing too narrow a construction upon an Act which may be termed, upon the whole, a remedial one; and they see no sufficient reason for limiting what is the *primâ facie* and natural meaning of its terms to the extent contended for. Their Lordships are, therefore, of opinion that the High Court was right in its determination on the point in question."

This is, therefore, clear authority for the proposition that, whether the right of cancellation arose from the provisions of the Act itself, or whether it arose under any agreement between

(1) 12 B. L. R., 439

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the parties, s. 78 of Act X of 1859 was applicable to a suit of this nature. Therefore s. 52, Act VIII of 1869, which now takes its place, is similarly applicable to the present suit. Under that section, if the arrears of rent due under the decree of the 31st May 1877 had not been paid up by the defendant, no doubt, the Court might have awarded a decree in favour of the plaintiffs for the cancellation of the lease; but then that decree could not have been executed, if, under the provisions of the 2nd para. of that section, the arrears of rent had been paid into Court within fifteen days from its date. In this case, it is not disputed that the arrears due under the decree of the 31st of May 1877 were deposited in Court as soon as the suit was brought. Therefore it is quite clear that, after the arrears were paid, there could not be a decree for cancellation of the lease, notwithstanding the express stipulation in the lease. It is contended before us that there is a distinction between this case and the Privy Council case quoted above, and the case decided by this Bench—*Mahomed Amir* v. *Dianut Ali* (1); and the distinction pointed out is this, that, under the conditions of the lease in this case, the defendant would be entitled to get back the nuzarana. But so far as the point before us is concerned, it seems to us that that distinction is immaterial. The object of the rule of law laid down in s. 52, Act VIII of 1869, and also in the cases cited above, is to prevent forfeiture if the rent be paid; and a Court of Equity grants this relief against forfeiture, because it considers that it would be too hard upon the tenant if such a condition as this were strictly enforced. Having regard to the reason of the rule, we do not think the distinction pointed out would make any difference as to the applicability of s. 52. We think that the decision of the lower Court is correct and dismiss this appeal with costs.

Appeal dismissed.

(1) 9 C. L. R., 185.

Before Mr. Justice Prinsep and Mr. Justice Bose.

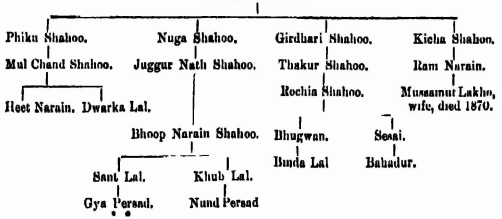
GYA PERSAD, *alias* LAL PERSAD, AND ANOTHER (DEFENDANTS) *v.* HEET NARAIN AND OTHERS (PLAINTIFFS).*

1882 *June* 17.

Adverse Possession—Limitation—Alienation by Hindu Widow—Limitation Act (XV of 1877), sched. ii, art. 141.

A title by adverse possession for more than twelve years accrues even during the lifetime of a Hindu widow, but if possession arises directly from any invalid alienation on her part, special provision is made for the right to sue on the parts of the reversioners within twelve years from her death and the accrual of their title.

THIS was a suit to recover possession of certain houses with mesne profits. The following genealogical table will show the relation of the parties:—



Two of the houses, numbered 3 and 6, had originally belonged to Ram Narain Sahoo, who died without issue in 1852, leaving Mussamut Lakho, his widow, him surviving; the remaining houses at that time were the property of Bhoop Narain Sahoo. In 1859, one Sheo Golam Bhagut obtained a decree against Bhoop Narain, and in 1862 the houses belonging to him were sold in execution of the decree and purchased by Sheo Golam, who subsequently sold them to one Sheo Narain Sahoo. On the 23rd of July 1863, Sheo Narain sold the houses to Mussamut Lakho, who paid for them out of moneys belonging to Ram Narain's

* Appeal from Appellate Decree, No. 2090 of 1880, against the decree of J. F. Stevens, Esq., Officiating Judge of Sarun, dated the 29th July 1880, affirming the decree of Baboo Grish Chunder Chowdhry, First Subordinate Judge of that district, dated the 22nd July 1879.

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estate. After Ram Narain's death, his widow entered into possession of his estate, and made over the houses 3 and 6 to Bhoop Narain Sahoo as her reversionary heir, and waived her life-interest therein. Bhoop Narain remained in possession of the other houses. Mussamut Lakho died in 1870 without having obtained possession of any part of the property. The present suit was instituted in 1876 by Heet Narain Sahoo and Dwarka Lal Sahoo against Gya Pershad, Nund Pershad, Binda Lal and Sessi. The defendants pleaded that the suit was barred by limitation, on the ground that the plaintiffs' cause of action arose when Mussamut Lakho was dispossessed or kept out of possession, which was more than twelve years from the date of suit. The Subordinate Judge held, that the time of limitation must be computed from the date of Mussamut Lakho's death, and that the suit was not barred. This decision was upheld by the District Judge.

The defendants appealed to the High Court.

Moonshee *Mahomed Yusoof* and Baboo *Raghunundan Pershad* for the appellants.

Baboo *Mahesh Chunder Chowdhry* for the respondents.

The judgment of the Court (PRINSEP and ROSE, JJ.) was delivered by

PRINSEP, J.—The sole point for our decision in this case is whether the suit is barred by limitation. The plaintiffs sued to recover certain property as having been bought in the name of Mussamut Lakho by Ram Narain Sahoo, and that, on the death of Lakho, they are entitled to succeed as her heirs. It appears that this property is now held by the heirs of Bhoop Narain Sahoo, who is a relative of both the plaintiffs and of Ram Narain, but subordinate as regards rights of inheritance to the plaintiffs. In April 1859, one Sheo Golam Bhagut obtained a decree against Bhoop Narain, in execution of which, in 1862, he sold the properties now in suit, Sheo Golam being himself the purchaser. He then sold his rights to one Sheo Narain Sahoo, who again, in July 1863, sold to Mussamut Lakho.

In November 1865, Lakho applied to execute this decree and got possession of this property; but nothing resulted from this application, for, on the following June, it was struck off for default. In November 1870 Lakho died, and the present suit has been brought on the 9th of April 1876,—that is to say, nearly fifteen years from the date of original purchase.

It is contended by the defendants, appellants, that, inasmuch as neither Lakho, nor her husband Ram Narain, has, at any time, been in possession of this property, and as more than twelve years have passed since their right accrued, during which the previous proprietor Bhoop Narain and his sons have held possession, the present suit is barred. On the other hand it is argued on behalf of the plaintiffs, that limitation would commence to run only from the death of Lakho Koer,—that is to say from November 1870. The rule which has been followed by this Court seems to be that a title by adverse possession for more than twelve years accrues even during the lifetime of a Hindu widow, but if possession arises directly from any invalid alienation on her part, special provision is made for the right to sue on the part of the reversioners, within twelve years from her death and the accrual of their title. Under such circumstances we think that the plaintiffs' claim is barred by limitation; but with regard to the houses 3 and 6, the suit is, on the defendants' own statement, not so barred; because they admit that she entered upon possession of these houses and made them over to the ancestors of the defendants as her reversionary heirs. Under such circumstances limitation would commence to run as against the plaintiffs only at her death. As regards these two houses, therefore, the order of the lower Appellate Court will be maintained; in other respects the order will be set aside. The plaintiffs will get possession of two-thirds of those two houses, Nos. 3 and 6. Costs in proportion.

Appeal allowed in part.

CRIMINAL MOTION.

Before Mr. Justice Maclean and Mr. Justice Macpherson.

1882
July 6.

IN THE MATTER OF THE PETITION OF HAVALDAR ROY AND ANOTHER.
HAVALDAR ROY AND ANOTHER *v.* JAGU MEAN.*

Appeal from Decision of Bench of Magistrates—Summary Procedure—Criminal Procedure Code (Act X of 1872), chap. xviii.

No appeal lies to a District Magistrate from the decision of a Bench of Magistrates composed of an Assistant Magistrate with second class powers and two or more Honorary Magistrates, in a case tried under chap. xviii of the Criminal Procedure Code.

Mr. *M. M Ghose* for the petitioners.

Mr. *Kilby* for the opposite party.

THE facts of this case sufficiently appear from the judgment of the Court (MACLEAN and MACPHERSON, JJ.), which was delivered by

MACLEAN, J.—The petitioners were tried before a Bench of Magistrates at Jugdespore on a charge of an offence under s. 352. The Bench was composed of an Assistant Magistrate with second class powers and three Honorary Magistrates. The former and two of the latter signed the judgment convicting the petitioners, and sentencing them to pay a fine of Rs. 5 each.

An appeal was preferred to the District Magistrate, who dismissed the appeal of Wahid Ali and enhanced the sentence of Havaldar Roy by addition of two months' rigorous imprisonment.

On motion made by counsel, the proceedings have been sent for and counsel heard on both sides. The first question for our decision is whether any appeal lay to the District Magistrate. This question is raised on behalf of the appellants

* Criminal Motion, No. 169 of 1882, against the order of the Jugdespore Bench of Magistrates (presided over by Mr. T. Inglis), Assistant Magistrate of Shahabad, dated the 22nd April 1882.

themselves. In fact they now assert that their appeal was improperly lodged. Had the sentence not been enhanced, we should not have entertained this objection. The case was tried under the summary procedure (chap. xviii), and if the Bench was invested with first class powers, there would be no appeal; see s. 274 of the Code of Criminal Procedure. Under para. 1 of Government Orders published in *Calcutta Gazette*, 1873, pages 17 and 662, any Bench of two or more Honorary Magistrates, sitting with a salaried Magistrate exercising not less than second class powers, is vested with first class powers. The case before us was, therefore, tried by a Bench vested with first class powers under that rule. The Deputy Legal Remembrancer has laid before us some orders of Government dated 31st March 1882, modifying other orders dated 31st January 1878, relating to the constitution of Benches in Shahabad. As to the orders of 31st January 1878, we have no information. Those of 31st March 1882 justify us in holding that the Jugdespore Bench under the presidency of a Magistrate (salaried) exercising second class powers, has jurisdiction to try all cases under s. 222 of the Code of Criminal Procedure,—that is, cases triable summarily by a first class Magistrate.

We think, therefore, that the District Magistrate was not competent to hear an appeal against the sentence of the Bench, dated 22nd April 1882. We accordingly set aside the order of 3rd May directing that Havaldar Roy be imprisoned for two months. Counsel for the petitioners does not press his case as to the order of the 22nd April, with which, therefore, we do not interfere.

Order set aside.

APPELLATE CIVIL.

Before Mr. Justice McDonell and Mr. Justice Field.

1882
June 29.

BEEPEN CHUNDER SHICKDAR AND OTHERS (JUDGMENT-DEBTORS) *v.* PURRESHNATH BISWAS AND OTHERS (DECREE-HOLDERS.)*

Sale in Execution of Decree—Irregularity—Substantial Injury—Civil Procedure Code (Act X of 1877), s 293.

At a sale in execution of a decree the property was knocked down to a bidder at Rs. 260. The bidder was unable to make a deposit, and the property was immediately put up for sale and re-sold for Rs 50. *Held*, that the judgment-debtor had sustained such substantial injury as would justify the Court in setting aside the sale, notwithstanding that the judgment-debtor might, under s 293 of the Civil Procedure Code, have recovered the difference between the original bid and the price at which the property was sold.

Baboo *Isur Chunder Chuckerbutty* for the appellants.

Baboo *Kali Churn Banerjee* for the respondents.

THE facts of this case sufficiently appear from the judgment of the Court (MCDONELL and FIELD, JJ.), which was delivered by

FIELD, J.—This is an appeal against an order of the Munsif refusing to set aside a sale. The application to set aside the sale was made on the ground that there had been substantial irregularity in publishing the sale-proclamation, and that the judgment-debtor in consequence of such irregularity, sustained substantial injury. The irregularity is said to consist in this, that the sale-proclamation was not published in the village. Three of the persons, whose names were inserted in the peon's report as having been present when the sale-proclamation was published, were called on the part of the judgment-debtor, and they denied that any sale-proclamation had been published in their presence. The other witnesses to the publication of the sale-proclamation were not called on behalf of the decree-holder;

* Appeal from Original Order, No. 41 of 1882, against the order of Moulvi Mahabbat Ali, First Munsif of Goalundo in Furreedpore, dated the 13th December 1881.

and there is in fact no evidence to show that the sale-proclamation was published, and no evidence to rebut the testimony given by the above three witnesses. Under these circumstances we must hold that the sale-proclamation was not published according to law.

Then as to the question of substantial injury, the Munsif, assuming the value of the property to be not more than Rs. 175, argues that the judgment-debtor sustained no substantial injury, because when the property was put up for sale, it was knocked down upon a bid of Rs. 260. In consequence of no deposit being made by the person who had made this bid, the property was immediately put up again and sold. The Munsif thinks that, because the judgment-debtor might, under the provisions of s. 293 of the Code of Civil Procedure, have recovered the difference between Rs. 260, the amount of that bid, and Rs. 50, the sum for which the property was ultimately sold, he cannot be said to have sustained substantial injury. This assumes that the property was sold for Rs. 260 at the sale, which was sought to be set aside. We think the Munsif was not justified in assuming this. It might be quite possible that the person who made this bid was a man of straw, and that the difference could never have been recovered from him. At any rate, under the provisions of s. 293, the judgment-creditor (as well as the judgment-debtor) could have applied to realize this difference; and, if he had succeeded in doing so, he would have deprived the debtor of the argument that he had sustained substantial injury. We think it would not be equitable to say that the judgment-debtor was bound to realize this difference, and that until he had tried to do so, or succeeded in doing so, the amount for which the sale was really effected ought to be taken to be the amount of this first bid, and not the amount for which the property was actually sold. There is evidence that the property was worth Rs. 175. There is no evidence that it was fairly valued at Rs. 50, for which amount it was sold at the sale sought to be set aside; and, under these circumstances, we think that the judgment-debtor did sustain substantial injury. We, therefore, reverse the Munsif's decree and set aside the sale with costs.

Appeal allowed.

Before Mr. Justice Mitter and Mr. Justice Maclean.

1882
June 20.

WAZIR MAHTON AND ANOTHER (JUDGMENT-DEBTORS) *v.* LULIT SING AND ANOTHER (DECREE-HOLDERS).*

Execution—Limitation Act (XV of 1877), *sched. ii, art.* 179, *para.* 2—"*Appellate Court.*"

The meaning of paragraph 2 to art. 179 of the second schedule of Act XV of 1877 is, that, where there has been an appeal, the period of limitation is to run from the date when the Court to which that appeal has been preferred passes an order disposing of the appeal

The words "Appellate Court" signify the Court or Courts to which the appeal, mentioned in the article, has been preferred.

THIS was an application for execution of a decree. It appeared that, on the 19th December 1877, the plaintiffs (decree-holders) obtained a decree against the defendants in accordance with an arbitration award. The defendants, pending suit, deposited a sum of Rs. 140 in Court in satisfaction of this decree; and afterwards applied to have the judgment set aside on review. Their application being rejected, they then appealed to the District Judge against the decree of the 19th December 1877. The District Judge dismissed the appeal on the 10th May 1879, and the judgment-debtors again appealed to the High Court. This appeal was, however, dismissed on the 12th March 1881.

The decree-holders, on the 23rd June 1881, applied for execution of their decree.

The judgment-debtors contended that the decree of the first Court having been passed in conformity with the award, no appeal would lie against it; and that, therefore, limitation ran from the date of the original decree, and not from the date of the final appeal from the decree; and that the plaintiffs should not be allowed costs and interest on the sum of Rs. 140 deposited in the Court. The Subordinate Judge of Patna held, that limitation ran from the final decree of the 12th March 1881, and that, therefore, the application was in time. He also held that

* Appeal from Appellate Order, No. 5 of 1882, against the order of H. Beveridge, Esq., Judge of Patna, dated the 28th October 1881, confirming that of Baboo Paresh Nath Banerjee, First Subordinate Judge of that district, dated the 3rd September 1881.

the plaintiffs were entitled to interest and costs on the Rs. 140, and disallowed both the objections.

The judgment-debtors appealed to the District Judge, who upheld the decision of the lower Court.

The judgment-debtors appealed to the High Court.

Mr. *R. E. Twidale* for the appellants.

Baboo *Saligram Singh* for the respondents.

The judgment of the Court (MITTER and MACLEAN, JJ.) was delivered by

MITTER, J.—Two objections have been urged against the decision of the lower Court. The first is that the application for execution is barred under art. 179 of sched ii, Act XV of 1877. It appears that the decree of the first Court was passed on the 19th December 1877, in accordance with an arbitration award. An appeal was preferred by the defendants, against whom the decree was passed; they contended that the decree should not have been in accordance with the award. The Appellate Court, after entering into the objection raised by the defendants, came to the conclusion that no appeal lay against the decree of the first Court, because it was in accordance with the award of the arbitrators appointed in the case. There was a second appeal preferred by the defendants, and the Court upheld the view of the lower Appellate Court that there was no appeal. The judgment of this Court is dated the 12th March 1881. On the 22nd June 1881, the present application for execution of the decree was filed. It is contended that, under art. 179, the application being filed more than three years from the date of the decree of the 19th December 1871, is barred. We do not think that this contention is correct, because the 2nd para. of art. 179 says, "where there has been an appeal, the date of the final decree or order of the Appellate Court,"—that is to say, where there has been an appeal, three years are to be counted from the date of the final decree or order of the Appellate Court. There is no question that in this case there was an appeal; although both the Appellate Courts held that

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WAZIR MAHTON v. LULIT SING.

no appeal would lie. The case, therefore, comes within these words of art. 179, *viz.*, "where there has been an appeal." The next question is whether there is any decree or order of the Appellate Court. There were orders no doubt of the Courts to which the appeals were preferred rejecting the appeals on the ground that no appeal would lie. The words "Appellate Court," in our opinion, here mean the Court or Courts to which the appeals mentioned in the section have been preferred. The meaning of this clause, therefore, in our opinion, is, that where there has been an appeal, the period is to run from the date when the Court to which that appeal has been preferred passes an order disposing of the appeal. That being so, it is quite clear that the present application is within time. The second objection taken is this: It appears that the defendants, while the original suit was pending in the first Court, deposited Rs. 140, alleging that that was all that was due from them to the plaintiffs. The decree subsequently passed was for a larger amount. Then, in the petition for execution, the plaintiffs (decree-holders) calculate interest upon the whole of the amount decreed from the date of the decree to the date of the application. The defendants object, on the ground that the plaintiffs (decree-holders) were bound to take out the money which was deposited in Court immediately on the passing of the first decree, and that there was nothing to prevent the decree-holders from withdrawing this money from the Court then, and therefore, in calculating interest, this amount should have been deducted from the amount of the decree on the date of the decree. The learned pleader for the respondents fairly admitted that this is a reasonable contention. We are also of that opinion. The decree-holders, therefore, in calculating the interest from the date of the decree should take the amount decreed minus the amount deposited as the principal. With this modification in the decree of the lower Court we dismiss the appeal with costs.

As the appellants have failed in their main ground, they must pay the respondents the costs of this appeal.

Appeal modified.

CRIMINAL MOTION.

Before Mr. Justice Wilson and Mr. Justice O'Kinealy.

IN THE MATTER OF THE PETITION OF PRAYAG SINGH AND OTHERS.
THE EMPRESS *v.* PRAYAG SINGH.*

1882
July 19

Jurisdiction—Protection of Property—Criminal Procedure Code (Act X of 1872), s. 518.

A Magistrate has no jurisdiction to make an order under s. 518 of the Code of Criminal Procedure merely for the protection of property.

THIS was a motion to set aside an order of the Assistant Magistrate of Nawada, directing Prayag Singh and others to remove a bund, which they had erected across a stream called the Goukhana, and ordering that the watercourse remain open until Prayag Singh and others should establish their right to close it in the Civil Court. The matter had been referred to the Sub-Deputy Collector for investigation and report, and his statement of the facts was as follows :—" The real facts of the case are, that there is a stream called Goukhana, which, issuing from the *Chur* of Haswa, passes through Pancher, Bugoour, Bujra, Sukra, and Kuhooara, and falls into the River Dhanarje. About a chain above the boundary of the Government estate Sukra, a *pyne* from the village Mea Bigha joins on to this stream. As the *pyne* of Mea Bigha is a little higher than the bottom of the stream, it requires a deal of deepening to take a sufficient quantity of water to the village Mea Bigha. But the maliks of Mea Bigha, instead of deepening their own *pyne*, placed in September last a dam across the main stream to take the water into their *pyne*. As this dam would not allow a drop of water to go to the Government estate Sukra, and would injure the cultivation of that estate, the tehseeldar reported the matter to Mr. Shircore, the then Subdivisional Officer, on the 28th September last, and an order was passed on the same day directing the maliks of Mea Bigha to remove the dam at once, or to

* Criminal Motion, No. 152 of 1882, against the order of E. N. Baker, Esq., Assistant Magistrate of Nawada, dated the 4th January 1882.

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EMPRESS v. PRAYAG SINGH.

file objections if they had any. The maliks wrote in reply to the notice on the 30th September, that they would file objections within fifteen days, but they filed no objections, and the dam was cut open. They again, on the 11th December 1881, placed a dam across the main stream, and kept about a dozen of lathials to guard the dam, so that the Sukra men might not cut it open. The maliks of Mea Bigha admitted that they had placed the dam and pleaded justification alleging that the bund is a very old one, and that they have been preserving it for generations." Several witnesses were examined before the Sub-Deputy Collector, who came to the conclusion that the proprietors of Mea Bigha had no right whatever to maintain the bund. He then went on to say: "As for most of the lands so injuriously affected by the dam the ryots pay rent in money, I apprehend a serious breach of the peace if the dam is not removed. Under the circumstances I consider it essentially necessary that the defendants Prayag Singh and other maliks of Mea Bigha be directed under s. 518, Criminal Procedure Code, to cut open the dam at once, and not obstruct the main course of the stream more than a day or two in the week. The defendants may also, I think, be prosecuted under s. 430, Indian Penal Code, for causing mischief by placing a dam across the irrigation channel of Sukra, the consequence of which has been a serious damage to the agriculture of that estate."

On the strength of the Sub-Deputy Collector's investigation and report, together with a visit made by him to the place where the bund had been erected, the Assistant Magistrate made the order now sought to be quashed.

Baboo *Umbica Churn Bose* and Baboo *Pran Nath Pundit* for the petitioners.

The judgment of the Court (WILSON and O'KINEALY, JJ.) was delivered by

WILSON, J.—The order of the Assistant Magistrate must be set aside as made without jurisdiction. The order under s. 518 can only be made when it is necessary to prevent obstruction, annoyance or injury to the person or injury to human life,

health, or safety or a riot or affray. Such an order cannot be made merely for the protection of property.

In the present case, taking the Assistant Magistrate's finding at the highest, it cannot amount to more than this, that the bund in question diminishes the supply of water to the land lying at a lower level.

Order quashed.

APPELLATE CIVIL.

Before Mr. Justice Cunningham and Mr. Justice Tottenham.

LALJEE LALL (DEFENDANT) *v.* HARDEY NARAIN (PLAINTIFF).*

1882
June 1.

Cause of Action—Jurisdiction—Contract—Promissory Note—Place of Performance—Code of Civil Procedure (Act X of 1877), *s* 17, *Illus.*

Where a promissory note is executed in one district, and it is agreed that the amount of the note shall be paid in another, the Courts of the latter district have jurisdiction to entertain a suit on the note.

The illustrations to s. 17 of the Code of Civil Procedure afford no safe guide as to what is meant in the Code by the term "cause of action."

Gopi Krishna Gossami v. *Nil Komul Banerjee* (1), *Muhammad Abdul Kadar* v. *E I. Railway Co.* (2), and *Vaughan* v. *Weldon* (3) followed.

IN this case the material portion of the judgment appealed from was as follows:—

"This is a suit to recover money due on a promissory note, dated the 3rd of October 1876. The defendant denies its genuineness, and contends that this Court has no jurisdiction to entertain this suit. The first point to be determined is, whether this Court has jurisdiction to entertain this suit. The facts stand thus:—The plaintiff is a banker in the district of Monghyr, where he has his principal place of business and his books of account; where he had, on other occasions, made payments for the defendant; and where, as an agent of the defendant, he paid

* Appeal from Original Decree, No. 263 of 1880, against the decree of Baboo Jogesh Chunder Mitter, Officiating Second Subordinate Judge of Bhagalpore, dated the 31st July 1880.

(1) 13 B L. R., 461; S. C., 22 W. R., 79.

(2) I. L. R., 1 Mad., 377.

(3) L. R., 10 C. P., 48.

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for him Government revenue, &c. But the note in suit was said to have been executed in the district of Durbhunga. No money was paid on it, it being in lieu of two others and for other sums due on other accounts. The plaintiff further contends—a contention which the defendant denies—that the defendant promised to pay the money at his central place of business at Monghyr. In this state of facts, and under the rule laid down in the case of *Gopi Krishna Gossami* v. *Nil Komul Banerjee* (1) and *Luckmee Chund* v. *Zorawur Mull* (2), I think this Court has jurisdiction to entertain the suit. 'The practical rule as to jurisdiction,' says Mr. Justice Markby in the former case, 'which has gained the most general acceptance, is that which allows the plaintiff to bring the suit either in the Court of the place where the contract was made, or in that of the place where it was to be performed.' Where no place of performance is prescribed by the agreement, Mr. Justice Birch points out, 'what we have to look to is the intention of the parties. If from the surrounding facts and the acts of the parties we can ascertain what place was in their contemplation the place of performance, the Courts of that place have jurisdiction.' Here, beyond doubt, the contract was made at Durbhunga, but leaving out of our consideration for a moment the alleged agreement of a payment at Monghyr, let us see what the intentions of the parties were. Here the plaintiff is a banker; his central place of business is at Monghyr, where he receives money due to him and pays what is due from him. The notes in lieu of which this note was executed were paid at Monghyr; other payments that were made for the defendant were also made at Monghyr. It was apparently an accidental circumstance that this note was executed at Durbhunga. The accounts of the defendant were kept by the plaintiff at Monghyr. The Government revenue that is paid by the plaintiff for the defendant is paid at Monghyr. These facts prove beyond the shadow of a doubt that the intended place of performance was at Monghyr. If again to those facts we add the presumption that the obligor is bound to seek the obligee and tender the money at the resi-

(1) 13 B. L. R., 461; S. C., 22 W. R., 79.

(2) 8 Moore's I. A., 291.

dence of the latter, I think there can be no reasonable doubt that the place of fulfilment thought of by the parties was at the plaintiff's banking firm at Monghyr. The plaintiff, however, goes further. He sets up an oral agreement, and proves by the evidence of his witnesses that it was specially agreed that the performance should be at Monghyr. Taking also the light afforded by the conduct of the parties as evidenced by the correspondence between them, that agreement seems to be probable, as otherwise the plaintiff could not have asked for payment at his own place of business."

The learned Judge then found that the note sued on was genuine, and decreed the plaintiff's claim, whereupon the defendant appealed to the High Court. The plaint, which was filed on the 17th of September 1879, described the defendant as a resident of the city of Durbhunga, and the note sued on ran as follows:—

"On adjustment of accounts as per former note-of-hand, and on account of payment of Government revenue, &c., the sum of Rs. 34,500 (thirty-four thousand and five hundred) is found due to you by me. I shall pay this amount, principal, with interest at 14 annas per cent. per mensem, within one year, and shall then take back this note-of-hand. For this purpose I execute this note-of-hand, that it may be of use when required. I acknowledge the note-of-hand for Rs. 34,500, which I have executed.

LALJEE LALL."

Mr. *Brauson* and Baboo *Chunder Madhub Ghose* for the appellant.

Mr. *Evans*, Baboo *Mohesh Chunder Chowdhry*, and Mr. *Twidale* for the respondent.

The following authorities were referred to:—For the appellant:—*Winter* v. *Way* (1), Beng. Reg. II of 1803, and *Sieveking Droop & Co.* v. *Focke* (2). For the respondent:—*Hills* v. *Clark* (3), *Gopi Krishna Gossami* v. *Nil Komul Banerjee* (4), *Hadjee Ismail* v. *Hadjee Mahomed* (5), *Mulchand Joharimal* v.

(1) 1 Mad. H. C., 200.
(2) 9 W. R., 215.
(3) 14 B. L. R., 367.
(4) 13 B. L. R., 461; S. C., 22 W. R., 79.
(5) 13 B. L. R., 91.

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Suganchand Shivdas (1), *De Souza* v. *Coles* (2), and *Sami Ayyangar* v. *Gopal Ayyangar* (3).

Cur. ad. vult.

The judgment of the Court (CUNNINGHAM and TOTTENHAM, JJ.) was delivered by

CUNNINGHAM, J.—This action is brought on a promissory note made at Durbhunga in the Mozufferpore District, but payable (as the evidence appears to us sufficiently to prove that the parties intended) in the Monghyr district. A plea is raised to the jurisdiction of the Bhagalpore Court, on the ground that the cause of action, within the meaning of s. 17 of the Code, did not arise within the local limits of its jurisdiction. This raises the question whether, when a contract is made in one place for fulfilment in another, a suit for the breach can, under s. 17 of the Code, be brought in the district where performance was intended to take place and the breach occurred, or whether the cause of action includes not only the breach on which the suit is brought, but the contract and other circumstances which, together with the breach, go to constitute the plaintiff's right to sue.

Conflicting decisions have been given by the English Courts as to the meaning of the corresponding words in the Common Law Procedure Act, 1852, s. 18, the latter of the two just mentioned views being taken in *Sichel* v. *Borch* (4), *Allhusen* v. *Malgarejo* (5), and *Cherry* v. *Thomson* (6); the former in *Jackson* v. *Spittal* (7), and ultimately by agreement in *Vaughan* v. *Weldon* (8).

On the Original Side of this Court the provisions in the Letters Patent enabling a suit to be brought, "with the leave of the Court," if the cause of action has arisen wholly or partially within the local jurisdiction, has been understood as suggesting the inference that "cause of action" means, for the purposes of suits on the Original Side, the contract as well as the breach;

(1) I. L. R., 1 Bom., 23.
(2) 3 Mad. H. C., 384.
(3) 7 Mad. H. C., 176.
(4) 33 L. J., Ex., 179
(5) L. R., 3 Q. B., 340.
(6) L. R., 7 Q. B., 573
(7) L. R., 5 C. P., 542.
(8) L. R., 10 C. P., 48.

and this view appears to have been taken on the Original Side of the Bombay, and until recently, of the Madras High Courts; see *Sugan Chand Shivdas* v. *Mulchand* (1). But on the Appellate Side there are decisions which we consider binding upon us, under which the rule laid down has been that the cause of action may, for the purposes of giving local jurisdiction to a Mofussil Court, be deemed to arise at the place where performance ought to take place, and where the breach occurs, a construction which corresponds to that agreed to by the English Judges in *Vaughan* v. *Weldon* (2), adopting the decision of the Judges of the Common Pleas in *Jackson* v. *Spittal* (3) as to cases under the Common Law Procedure Act, 1852.

In *Gopi Krishna Gossami* v. *Nil Komul Banerjee* (4) a contract was made at Serampore, for certain transactions to be carried on in Calcutta, *A* agreeing to advance funds on condition of repayment with interest within a certain date. The money was paid partly in Serampore and partly in Calcutta. A suit was brought in the Hooghly Court for recovery of the balance of the sum advanced, and it was urged that, as the whole of the cause of action did not arise within the local jurisdiction, an action would not lie. Markby and Birch, JJ., held, that the action might be brought in the place where the money was to have been paid, referring to the decision of the Privy Council in *Luchmee Chund* v. *Zorawur Mull* (5), in which it was held that the central place of business of the contracting firm, being the place where the books were kept, the accounts would have to be balanced, and the payment of the balance, if any, made, was the place where the plaintiff's action lay. This view was also taken by a Full Bench at Agra, *Prem Shook* v. *Bhekoo* (6). The same view was adopted in *Hills* v. *Clark* (7), where Jackson, J., held, that where a contract was made in Moorshedabad for seed to be delivered in Nuddea and to be paid for, on delivery, by an order to be sent to plaintiff at Moorshedabad on receipt of the goods, a suit for nonpayment would lie in the Moorsheda-

(1) 12 Bom., 123.
(2) L. R., 10 C. P., 48.
(3) L. R., 5 C. P., 542.
(4) 13 B. L. R., 461; S.C., 22 W. R., 79.
(5) 8 Moore's I. A., 291.
(6) 3 Agra, 242.
(7) 14 B. L. R., 367.

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bad Court. In this case the authorities were considered and reliance appears to have been placed on the views expressed by Holloway, J., in *De Souza* v. *Coles* (1).

The same view was taken by Morgan, C. J., and Innes, J., in *Sami Ayyangar* v. *Gopal Ayyangar* (2). In that case the defendant executed in the Tanjore district a mortgage of land situated in the Trichinopoly District. In order to make it enforceable, the deed required registration in the Trichinopoly district. The suit was brought to compel the defendant to register, and it was held that though the contract was made in Tanjore, the cause of action had arisen in Trichinopoly, inasmuch as, from the nature of the act to be performed, it was the place of the fulfilment of the obligation. It is true that in this case the obligation on which the action was brought arose directly from a statutory requirement, instead of, as in the case before us, from contract; but this does not in our opinion affect the application of the rule laid down.

In *Muhammad Abdul Kadar* v. *E. I. Railway Co.* (3), Kernan and Kindersley, JJ., adopted, even in a case on the Original Side of the Court, the rules laid down in *Gopi Krishna Gossami* v. *Nil Komul Banerjee* (4) and *Vaughan* v. *Weldon* (5). We consider ourselves accordingly bound by authority, unless it can be shown that the state of the law has been altered by subsequent legislation. As to this it is contended that the illustrations given to s. 17 of the Code of Civil Procedure are to be read as adopting and sanctioning the view that the cause of action embraces the contract as well as the breach, and that, consequently, where the contract is made in one place and the performance is to take place in another, no local jurisdiction arises.

This is not in our opinion the proper inference to be drawn from the illustrations. The Legislature has, in the Code of Civil Procedure, thought fit not to define "cause of action." This omission may have arisen from the circumstances that different views were held in different Courts on the point, and that the

(1) 3 Mad. H. C., 384.
(2) 7 Mad. H. C., 176
(3) I. L. R., 1 Mad., 377.
(4) 13 B. L. R., 461; S. C., 22 W. R., 79.
(5) L. R., 10 C. P., 48.

framers of the Act did not consider it desirable on that occasion to lay down one uniform rule. At any rate there is no definition of "cause of action," nor any illustration immediately directed to pointing out where the cause of action arises and where it does not. This being so, it appears to us that the illustrations are intended merely to illustrate the rules laid down in the section,—1st, that a suit may be brought either where the cause of action arose, or the defendant resides or carries on business; and 2nd, that where there are several defendants, the action may be brought either where the cause of action arose or any one of the defendants resides or carries on business, provided the leave of the Court be obtained or the other defendants acquiesce.

In both instances the illustrations appear to us to avoid the question as to what constituted "cause of action" by giving facts which, on any theory, would be held to constitute it: and the utmost that, in our opinion, can fairly be inferred from their language, is that there is no intention to show that the narrower definition is the one sanctioned by the Code. This, however, falls entirely short of laying down a rule on the subject, and leaves the matter where it previously was.

We therefore do not consider that the illustrations have modified the previously existing state of the law, and this being so, we are bound to follow the previous judgments of the Court, which appear to lay down the more convenient rule and to be sanctioned by the concurrence of several of the other High Courts and the resolution of the English Judges in *Vaughan* v. *Weldon* (1).

As to the question of the payments alleged by the defendant and the other points raised in appeal, we concur in the view taken by the original Court.

The appeal must, therefore, be dismissed with costs.

Appeal dismissed.

(1) L. R., 10 C. P., 48.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

1882
May 11.

GAURI PROSAD KOONDOO (DECREE-HOLDER) *v.* REILY (JUDGMENT-DEBTOR).

Execution of Decree—Mesne Profits how estimated—Amount stated in Plaint—Estoppel.

When, in a suit for possession of land and mesne profits at a rate stated in the plaint, a decree is passed which directs that the amount of mesne profits be ascertained in execution of the decree, the plaintiff is not limited to the amount or rate stated in his plaint, though it may be used as evidence against him in favour of the defendant.

Baboojan Jha v. *Byjnath Dutt Jha* (1) explained.

THE facts of this case are fully set forth in the following judgment of the lower Appellate Court:

"The first point raised by this appeal is, whether the appellant can recover mesne profits to an amount exceeding that claimed in his plaint and decreed to him. In the plaint mesne profits are claimed for the period from Baisakh 1281 (April—May 1874) to the 6th of Choitro 1282 (18th March 1876), and their amount is declared to be Rs. 41-11-11, at the rate of Rs. 21-8-18 per annum. The Munsif decreed the plaintiff's (appellant's) claim to possession of 117 out of the 121 plots in suit, and that "the plaintiff do get wasilat from 1281 to this day (the 15th of September 1876 = 31st of Bhadro 1283), and the amount of wasilat is to be ascertained in execution of this decree." The decree of the Munsif was affirmed successively by the Judge and the High Court. In execution, the decree-holder seeks to recover mesne profits at the rate of Rs. 347 a year. The Munsif, on the authority of *Gooroo Doss Roy* v. *Bungshee Dhur Sein* (2), which, as he observes, was a case precisely similar to the present, has refused to allow mesne profits at a rate in excess of that claimed in the plaint, and for the period subsequent to the 31st of Bhadro 1283 (15th of September 1876), and assessed the mesne profits payable under the decree at Rs. 52-8-0, with interest at 6 per cent. from the 16th of September 1876 until the 14th of August 1880, the date of such assessment. The aggregate thus awarded is Rs. 76-7-0. Unquestionably the cases of *Gooroo Doss Roy* v.

* Appeal from Appellate Order, No. 306 of 1881, against the order of J. F. Bradbury, Esq., Officiating Judge of Furreedpore, dated the 18th August 1881, affirming the order of Baboo Kishna Nath Roy, Sudder Munsif of that district, dated the 14th August 1880.

(1) I. L. R., 6 Calc., 472; S. C., 7 C. L. R., 539.

(2) 15 W. R., 61.

Bungshee Dhur Sein (1) and *Baboojan Jha* v. *Byjnath Dutt Jha* (2) do lay down that the plaintiff, in the absence of special circumstances, cannot recover damages in the nature of mesne profits in excess of the sum claimed in the plaint; but the Munsif has awarded a sum in excess of that claimed by his decree. The claim was for a period terminating on the 6th of Choitro 1282) 18th of March 1876), whereas the Munsif decreed mesne profits up to and inclusive of the 31st of Bhadro 1283 (18th of September 1876). By a cross appeal, the respondent denies the appellant's right to mesne profits *in toto*; but that question is concluded by the affirmation of the Munsif's decree on a first and second appeal. That decree distinctly awards mesne profits up to the date of the decree. It is now settled that if the decree is silent on the subject of mesne profits subsequent to the date of the institution of the suit, the Court executing the decree cannot assess or give execution for such mesne profits: *Sadasiva Pillai* v. *Ramalinga Pillai* (3). The same principle of the inability of the Court executing a decree to add to it precludes it from assessing or giving execution for mesne profits accruing due subsequently to the date of the decree, where the decree is silent on the point. The plaintiff, appellant, is, therefore, debarred from recovering, in execution, mesne profits for the period beginning with the 1st Ashar 1283. His remedy is a separate suit.

"With regard to the period anterior to that date I conceive that he is bound by his own assessment of the mesne profits; as the Munsif has pointed out he has ample means of knowing or ascertaining their amount before action brought, and he estimated the amount at Rs. 21 odd annually. No special circumstances exempting him from the operation of the rule enumerated in *Gooroo Doss Roy* v. *Bungshee Dhur Sein* (1) and *Baboojan Jha* v. *Byjnath Dutt Jha* (2) are suggested, much less proved; and I therefore uphold the Munsif's decision on the question of the annual rate at which the mesne profits are to be assessed. The respondent, in cross appeal, takes exception to the aggregate mesne profits awarded, on the ground that, having dismissed the appellant's claim to four of the plots in dispute, the annual amount of mesne profits should be proportionately reduced; but I do not understand the High Court rulings I have quoted to go so far as to lay down that, in no instance, can the plaintiff recover in excess of the rate

(1) 15 W. R., 61.

(2) I. L. R., 6 Calc., 472; S. C., 7 C. L. R., 539.

(3) 15 B. L. R., P. C., 383.

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claimed. In each of those cases the plaintiff recovered the full amount claimed, and in this instance the Munsif does not decide that the claim made in execution is groundless and exorbitant, but merely that, exceeding the amount laid down in the plaint, it cannot be awarded. The appellant is clearly entitled to recover at least the amount awarded to him. Had the amount been specified in the decree, nothing in excess of the sum decreed could be recovered; but the Munsif having reserved the assessment of mesne profits for the execution of the decree, was, I conceive, competent to assess and award any sum not exceeding the aggregate of the annual rate declared in the plaint for the period for which the decree gave mesne profits.

"The respondent further contends that the Munsif ought not to have given interest on the mesne profits. The Munsif seems to have considered s. 211, Civil Procedure Code, as sanctioning the award of interest. At least he quotes that section and the explanation thereof, but its application is clearly confined to cases where the Court has provided in its decree for the payment of interest, which this decree did not do. I consider however that the appellant is entitled to interest independently of the express provisions of any Act, on the principle expounded in *Luckhy Narain* v. *Kally Puddo Banerjee* (1) and the authorities there cited, and that, whether the decree provides for such interest or not. In *Luckhy Narain* v. *Kally Puddo Banerjee* (1) the decree appears to have been silent on the subject of interest, which was nevertheless awarded. Finally, both the appellant and respondent appealed regarding costs. The Munsif disallowed the costs of both. I do not, however, comprehend why the plaintiff is not to get proportional costs. I am not prepared to say, and I do not understand the Munsif to say, that he has been guilty of fraud. He may yet succeed in recovering mesne profits at the higher rate for the period posterior to the 31st Bhadro 1283. I accordingly direct that the appellant do recover the costs of the enquiry into and ascertainment of the amount of mesne profits in the Court below. Such costs to bear the same proportion to the whole of the costs incurred by him as the amount of mesne profits awarded to him bears to that claimed. In the result I dismiss the cross-appeal of the respondent with costs."

The decree-holder appealed to the High Court.

Baboo *Girija Sunker Mozoomdar* for the appellant.

Baboo *Kashi Kant Sen* for the respondent.

(1) I. L. R., 4 Calc., 882.

The judgment of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

PRINSEP, J.—The point we are called upon to decide in this appeal is, whether the plaint having stated the amount of mesne profits claimed at a certain sum of money, and the decree having directed the amount to be ascertained in execution, the plaintiff, decree-holder, is estopped from claiming any excess of the amount stated in his plaint.

As an authority for the affirmative of this proposition the case of *Baboojan Jha* v. *Byjnath Jha* (1) has been cited. We have consulted the learned Judges who passed that judgment, and we are authorized by them to state that they did not then intend to enunciate any general rule for adoption in such cases. We are therefore at liberty to deal with this case on its own merits.

It appears to us that—as stated by Dwarkanath Mitter, J., in the case of *Pearee Soondaree Dossee* v. *Eshan Chunder Rose* (2)—the decision in the original suit having declared the amount of mesne profits should be determined in execution, the Courts are not precluded from varying or altering the decree in that suit. This was the conclusion arrived at by a Full Bench of this Court—*Mosoodun Lall* v. *Bheekaree Singh* (3), and affirmed by their Lordships of the Privy Council in numerous cases; see *Pillai* v. *Pillai* (4), *Forester* v. *Secretary of State for India* (5), *Gokuldass* v. *Murli* (6). We are therefore of opinion that, in executing such a decree as that now before us, the plaintiff is not estopped from proving that he is entitled to a larger sum as mesne profits than that claimed in his plaint. This is in accordance with s. 11 of the Court Fees Act, which declared that, in suits for mesne profits, or for immoveable property and for mesne profits, if the profits or the amount decreed are or is in excess of the profits claimed, the decree shall not be executed until the difference of fee has been paid. It also appears to be the view adopted by their Lordships of the Privy Council in the case of

(1) I. L. R., 6 Calc., 472; S. C., 7 C. L. R., 539.

(2) 16 W. R., 302.

(3) 6 W. R., Mis., 109.

(4) L. R., 2 I. A., 219.

(5) L. R., 4 I. A., 137.

(6) L. R., 5 I. A., 78.

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Fakharuddin Mahomed Ahsan Chowdhry v. *Official Trustee of Bengal* (1), for we find from an inspection of the record that the successful party obtained a larger sum as *wasilat* than he had claimed in his plaint. At the same time we would observe, that if it should appear that, in making his original claim for mesne profits, a plaintiff has special means of knowledge for determining the amount due, the judgment-debtor can fairly use as evidence against him his own statements embodied in his plaint. Applying this principle to the present case, we think that it must be remanded for reconsideration by the lower Appellate Court. Costs to abide the result.

Case remanded.

Before Mr. Justice Cunningham and Mr. Justice Tottenham.

1882 *April* 24.

LUKHYNARAIN CHUTTOPADHYA (PLAINTIFF) *v.* GORACHAND GOSSAMY (DEFENDANT).*

Special Appeal—Revenue Sale Law—Evidence—Registration—Common Registry—Act XI of 1859, *s.* 39.

The fact that a tenure is registered in the Common Registry under Act XI of 1859, s. 39, is not of itself *primâ facie* evidence that such a tenure exists.

In a suit for damages for trespass laid at a sum under Rs. 100, a special appeal will lie to the High Court if the title to the land trespassed upon has been raised in the Courts below.

THE facts of this case are fully set forth in the following judgment of the lower Appellate Court:—

"The circumstances in connection with the suit out of which this appeal has arisen are these. Asura Madhanpore and other mauzas formed a revenue-paying estate, and they were registered in the Collector's towji under two numbers, *viz.*, 61 and 325, each of them representing a moiety of the estate. When the estate was advertised for sale on account of arrears of revenue, the plaintiff informed the Collector that he held the property in mokurari and was in possession, and prayed to have the sale stopped by offering to pay the arrears due.

* Appeal from Appellate Decree, No. 495 of 1881, against the decree of Baboo Brojendro Coomar Seal, Additional Judge of Bankura, dated the 30th December 1880, affirming the decree of Baboo Jogendro Nath Bose, Munsif of Gungajulghatty, dated the 15th October 1879.

(1) L. R., 8 I. A., 197.

That application is dated the 1st of November 1878. The order of the Collector (Mr. Waller) runs as follows: 'I cannot, as Collector, interfere. Applicant's remedy will lie in the Civil Court.' That order was made on the 2nd November 1878. The plaintiff appealed to the Commissioner, and he was informed by a written notice, bearing date the 3rd December 1878, that his appeal had been rejected. In the meantime the property was sold on the 18th November 1878, and purchased by the defendant, who was put in possession by order of the Collector. After obtaining possession, the defendant collected rents from the tenants and took some fruits from the mangoe and jack trees. There could not, therefore, be any mistake that the object of the defendant was to ignore the mokurari right of the plaintiff to the mouza if he had any. Under such circumstances a suit to have the mokurari right established would have been intelligible, but the plaintiff did not want to have such broad relief. His suit was peculiar in its nature. It was a suit to have his title to two mangoe trees and one jack tree, and to the land on which they stand, established, and to recover damages without applying for leave of the Court under s. 44 of the Procedure Code. He valued the land on which the three trees stood, at 1 anna and six pie, the value of the trees at Rs. 13, and the value of the fruits taken at Rs. 6, 10 annas; total value of the claim was Rs. 19 annas 11 pie 6. The defendant denied his liability to pay damage and put the plaintiff to the proof of the patta set up by him. The plaintiff offered no evidence to prove the patta, but showed that, in 1862, he had his tenure registered under the provisions of Act XI of 1859, and contended that he was, therefore, protected by the provisions of s. 37 of that Act.

"Now it ought to be observed, that the fact of a tenure having been registered under the sale-law does not show that the patta which is said to have been granted is proved. The procedure to be followed for getting a tenure under Act XI registered is laid down in s. 40. That section does not even impose upon the applicant for registration an obligation to file the patta before the Collector. It is just like an application for foreclosure of a mortgage. Because a mortgagee has applied for foreclosure, and the year of grace has expired, it does not follow that the mortgagee is to get a decree without proof of the mortgage when the truth of the deed is not admitted. If a tenure-holder is able to prove that the tenure was in existence, that it was actually created by the late proprietor, the fact of the registration would protect him; but if he fails to show that the tenure existed, the

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fact of his having registered the existence of something which never existed, would not create a right which he never possessed. The patta put forward by him bears date the 29th of March 1855. It is, or purports to be, only twenty-six years old, so it has to be proved. The plaintiff made no attempt to prove it.

It has to be noted that the alleged lessor, by her petition of the 3rd January 1866 presented before the Settlement Authorities, appears to have distinctly denied having granted any such patta. The defendant distinctly alleged, in his written statement, that the father of the plaintiff was a servant under the employ of Raja Gopal Singh, the husband of the alleged lessor. There is, indeed, no evidence properly so called to show that he was the servant; but there is every reason to believe that he was so. My ground for believing it is this. The first Court distinctly finds it in its judgment that the plaintiff's father was in the employ of Raja Gopal Singh. If it were not the fact, the appellant would have instructed his pleader to take exception to it most prominently in his memo. of appeal; but the appellant did not even make the slightest suggestion in his petition of appeal that that finding was wrong.

The patta appears to direct the lessee to pay Rs. 40 annas 8 to the Collector as revenue, Rs. 4 annas 6 to one Ram Das, and Rs. 10 to the lessor herself. The plaintiff has not been able to file a single receipt to show payment of any portion of the rent to the lessee or to Ram Das. He has filed some receipts to show payment of revenue. But it is quite intelligible why, as a servant of the rani, his father should be the custodian of such receipts, and why he should, from time to time, collect rent as a servant of the raja. Everything turns upon the proof of the patta, and there is no proof whatever. The suit is, it ought to be remembered, to have a declaration that the plaintiff has a good title to the trees and the land on which they stand, and the basis of that title remains unproven. So far as possession is concerned, there is no proof that the plaintiff was in possession under his alleged patta. There is some evidence to show that his father sometimes collected rent, but that is not conclusive. He, as servant of the raja, would be the proper person to collect the rent. It is needless to enter into a discussion of the question as to whether the patta granted, as it purports to have been, by Rani Churomani would have created a valid title in plaintiff's favour if it had been proved."

Baboo *Bungshee Dhur Sen* for the appellant.

Baboo *Umbica Churn Bose* and Baboo *Rash Behary Ghose* for the respondent.

The judgment of the Court (CUNNINGHAM and TOTTENHAM, JJ.) was delivered by

TOTTENHAM, J.—A preliminary objection is taken by the respondent's pleader in this case, that no second appeal lies, the subject of the suit being, as he submitted, one of the Small Cause Court class. For the appellant, however, it was contended, and, as we think, rightly contended, that the question of right to the land was raised by the plaintiff, and that the suit was treated by both the Courts below as one for title. We therefore hold that the appellant has a right to have the second appeal heard and the question of title decided.

The suit was brought against an auction-purchaser under Act XI of 1859 for an alleged trespass and damage done by him to the plaintiff by appropriating the fruit of certain trees said to be upon the plaintiff's mokurari tenure, which mokurari tenure is alleged to have been registered in the Common Register under Act XI of 1859. He, however, did not produce any further evidence of the existence of the tenure beyond filing a mokurari patta, and of that patta he adduced no proof.

For the appellant it is contended that the fact of registration under Act XI of 1859 is in itself *primâ facie* proof of the existence of a tenure registered in the Common Register. We think that this is not so. If the tenure in this case had been specially registered, then, under s. 50 of the Act, entry in the Special Register would apparently have been *primâ facie* good evidence of the existence of the tenure, but no such provision is made in the Act with regard to registration in the Common Register. It may be observed that, in any case in which a registered document is produced, the fact of registration is not accepted as *primâ facie* evidence of the genuineness of that document. It has to be proved independently. We see no reason to hold that the registration of a tenure in the Common Register under Act XI of 1859 relieves the person alleging such tenure of the necessity of proving its existence in the regular way. Section 37 of the Act provides, that certain

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tenures, if registered, are protected from being set aside by auction-purchasers. The effect of this is, that a *bonâ fide* tenure actually proved is not protected unless it is registered. It does not provide that the registration of an alleged tenure will have the effect of proving it. We think, therefore, that the registration of the tenure alleged in this case is not a sufficient proof of the plaintiffs title.

The appellant's pleader, however, contended that there was further evidence in an admission by the lessor of the genuineness of the patta, such admission being contained in a petition made to the Collector at the time of the execution of the patta, or shortly afterwards, praying the Collector to enter the tenure in his books, and to hold the lessee responsible for a certain portion of the Government revenue. It turns out, however, that the petition here referred to is only a copy of the petition made, not by the lessor, but by a person calling himself the mooktear of the lessor. The petition, therefore, is of very little importance in this case, especially when we find that another petition made by the lessor before the Settlement Officer expressly repudiates any such patta as is now set up by the appellant.

It is unnecessary for us to go into the merits of the case, but we think that the lower Appellate Court was right, as a matter of law, in confirming the decision of the first Court.

The appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Cunningham and Mr. Justice Tottenham.

1882 *May* 3.

BISSORUP GOSSAMY AND OTHERS (PLAINTIFFS) *v.* GORACHAND GOSSAMY AND OTHERS (DEFENDANTS).*

Suit for Possession—Co-defendants—Res Judicata—Civil Procedure Code (Act X of 1877), *s.* 13.

A leased lands to *B*, who sued *C* for possession of a certain mauza, alleging it to be a portion of the lands leased. *A* was made a defendant, and supported the case of the plaintiff, who obtained a decree. *C* appealed, making *A* and

* Appeal from Appellate Decree, No. 2235 of 1880, against the decree of Baboo Brojendro Coomar Seal, Additional Judge of Bankura, dated the 28th June 1880, affirming the decree of Baboo Jogendro Nath Bose, Munsif of Gungajulghatty, dated the 21st March 1879.

B respondents, when the decree was reversed and the suit dismissed, on the ground that the mauza sued for was the property of *C*; and that ruling was upheld on special appeal to the High Court. Subsequently *A* brought a suit against *C* for the same mauza, making *B* a defendant.

Held, that the title to the mauza was *res judicata* between *A* and *C*, and that the suit would not lie.

Gobind Chunder Koondoo v. *Taruck Chunder Bose* (1) followed.

THE facts of this case, and the contentions raised by both parties, are fully set out in the judgment of the lower Appellate Court, which is as follows :—

"The issue raised in the case is, whether the disputed land, which goes by the name of Bonkata, forms a part and parcel of Mauza Gossamipur, or is it a separate mauza by itself distinct from Gossamipur. The very same issue was raised in suit No. 393 of 1865, and it was found that there was no separate mauza by the name of Bonkata, comprising the land in dispute, but that it was part of Gossamipur. The first Court has held, therefore, that the present suit is barred by the rule of s. 13 of the Civil Procedure Code. In appeal I have to see whether that view is correct or not.

"The facts of suit No. 393 of 1865 have to be closely examined. In that suit, Monmohini Dabia was the plaintiff. She stated that she had taken a patni of Mauza Bonkata on the 2nd of Pous 1271 (15th December 1864) from the plaintiffs in this case, and endeavoured to take possession on the 19th Pous 1271 (1st January 1865), but in consequence of the resistance offered by the defendants, she could not get possession. She, therefore, wanted to recover possession on an adjudication of her title. In that suit the plaintiffs in this case were made *pro forma* defendants. They filed a written statement supporting Monmohini. At the trial they produced documentary evidence in support of their allegation. The first Court, in its judgment, took notice of their document. It was found by the Munsif that Bonkata was a separate mauza, and the claim of Monmohini was decreed on the 31st of May 1866. In appeal, Monmohini and her lessors, the present plaintiffs, were respondents; and the defendants were the appellants. The Appellate Court took notice of the documents filed by the plaintiffs, but it came to a different conclusion, and the claim of Monmohini was dismissed, it being found that Bonkata was not a separate mauza, but that it formed part of Gossamipur. That judgment bears date the 24th of September 1866. It was confirmed in

(1) I. L. R., 3 Calc., 146.

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special appeal on the 28th of March 1867. The judgment of the High Court is not with the record.

"In their plaint in the present suit, the plaintiffs say that they had made a permanent settlement of the mauza with one Dinobundhu Chuttopadhya in 1237, and were in possession through him; that Dinobundhu having failed to pay rent, they brought a suit against him, and in execution of the decree in that case entered into khas possession (when, it is not stated), and afterwards made a settlement of it with Monmohini Dabia on the 2nd Pous 1271 (15th December 1864), and received rent from her up to the year 1274. Thus, though Monmohini never obtained possession of the property, and though it was finally settled by the High Court on the 28th of March 1867 (16th Cheit 1273) that the plaintiffs were not entitled to get rent on account of this property, the plaintiffs say that Monmohini paid rent up to the year 1274. The first Court notices that Monmohini is the mother of plaintiff No. 5. These are the facts of case No. 393 of 1865, and the plaintiffs in the present case date their cause of action from the time that the judgment in Monmohini's case was confirmed by the High Court.

"The difference between the case of Monmohini and that of the plaintiffs is this, that whereas the property in dispute in the case of Monmohini was the patni interest, in this case it is the zemindary right which is the subject of dispute; but the issue which has to be decided in this case is the same which was raised in that case. In case No. 393, the present plaintiffs occupied the position of *pro formâ* defendants, it is true; but s. 13 of the Procedure Code does not appear to make any distinction between principal parties and *pro formâ* parties. Throughout the Code there is no mention of *pro formâ* parties. Parties or no parties, the plaintiffs were parties. Were they parties litigating under the same title? Monmohini litigated for herself and for the plaintiffs, and the plaintiffs supported her, and were parties. The right for which Monmohini contended was one in which the plaintiffs were interested. According to Explanation V of s. 13 and the Full Bench case of *Gobind Chunder Koondoo* v. *Taruck Chunder Bose* (1), section 13 appears to bar the plaintiffs. My attention has been drawn to the case of *Price* v. *Khelat Chunder Ghose* (2). That case was decided in 1870, long before the Procedure Code of 1877 came into operation.

"The plaintiffs were *pro formâ* defendants, and from their position as defendants it is stated that they could not join issue with the other

(1) I. L. R., 3 Calc., 146. (2) 13 W. R., 461.

defendants. No doubt it was so, but every case has to be decided on its own merits. Monmohini, the plaintiff in that case, was the mother of plaintiff No. 5. The plaintiffs, if so disposed, might join Monmohini as plaintiffs, but they did not like to do so, and they were made *pro formâ* defendants. As *pro formâ* defendants they did not contend that they were not necessary parties to the case, but, on the other hand, supported Monmohini, and put in documentary evidence. In appeal, Monmohini and the present plaintiffs were respondents. So it was open to the plaintiffs to appeal to the High Court in the same way as Monmohini did, for they were interested in the issue that was tried in the same way as Monmohini was. There may be cases in which the position of *pro formâ* defendants would not allow them to appeal, but suit No. 393 was not one of such cases. I agree with the first Court in holding that the issue which is raised in this case cannot be tried again. Without entering into the question as to whether the suit is barred by limitation, I dismiss the appeal with costs."

The plaintiffs appealed to the High Court, on the ground that the Court below was in error in holding that the present suit was barred under s. 13 of the Code of Civil Procedure.

Baboo *Boikunt Nath Dass* for the appellants.

Baboo *Umbica Churn Bose* for the respondents.

The judgment of the Court (CUNNINGHAM and TOTTENHAM, JJ.) was delivered by

CUNNINGHAM, J.—In this case the plaintiffs sue for possession of certain land, described as Mauza Bonkata, on a declaration of their title thereto. They allege that their ancestors obtained the entire Mauza Gossamipur and two drones of land transferred from the jamai of Jugurnathpore; that these two drones were reclaimed and called Mauza Bonkata, and were let on mokurari lease to the father of the defendant Dinobundhu; that, on Dinobundhu's failure to pay rent, the land was resumed and let on patni to the 13th defendant, Monmohini; that Monmohini sued the principal defendants for possession, and obtained a decree in the original Court, which was reversed in appeal and special appeal, 28th March 1867; that Mauza Bonkata

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never did appertain to Mauza Gossamipur, and never belonged to the defendants. In that suit the present plaintiffs were joined as defendants.

The defendants contend, and the Courts below have held, that the suit is barred by s. 13 of Act X of 1877, inasmuch as the main issue in the case,—*viz.*, the question whether the disputed land appertains to Mauza Bonkata and belongs to the plaintiffs, —has already been raised and adjudicated in a suit to which the present plaintiffs and defendants were parties,—*viz.*, the suit brought by Monmohini, the 13th defendant in the present suit, against (i) the present defendants and (ii) the present plaintiffs.

It appears that Monmohini is the mother of the 5th plaintiff in the present suit, and that, in the former suit, the present plaintiffs, though formally joined as defendants, supported Monmohini's case and put in evidence in its support; and that, in appeal, Monmohini and the present plaintiffs were joined as respondents. In that appeal it was decided that the disputed land did not form a separate mauza, as Bonkata Mauza, but pertained to Gossamipur; and that the present plaintiffs not having any rights in it could not settle it with Monmohini.

The same issue is raised in the present suit; but it is contended that s. 13 does not apply, the matter not having been "in issue between the same parties," inasmuch as the present plaintiffs were co-defendants in that suit with the present principal defendants, and Monmohini, the present 13th defendant, was plaintiff.

We concur with the Courts below in thinking this contention unsound. The material point for deciding whether a matter has become *res judicata* under s. 13 is, whether it was directly and substantially in issue between the same parties and was finally decided. If the issue is clearly raised between the several parties to the suit and adjudicated, it matters not that the parties were marshalled in the one case differently from the other—*Gobind Chunder Koondoo* v. *Taruck Chunder Bose* (1). Here there can be no doubt, that though the present plaintiffs were joined as defendants in the former suit, they were practically supporting the case of the plaintiff and had the fullest

(1) I. L. R., 3 Calc., 146.

opportunity of contesting the point which that suit decided, a circumstance which is proved by their being joined as respondents in the appeal. In these circumstances, the plaintiffs are, in our opinion, debarred under s. 13 from now again contesting the same point with the parties to the former suit. The appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

BHOOTNATH CHATTERJEE (DEFENDANT) *v.* KEDARNATH BANERJEE AND OTHERS (PLAINTIFFS).*

1882 *June* 19.

Suit for Possession—Previous Dispossession—Limitation—Adverse Possession—Evidence—Onus.

In every suit for the recovery of land, on the allegation of previous dispossession by the defendant, the plaintiff must start his case by showing that, at some time within twelve years previous to the institution of the suit, he has been in possession of the land sued for.

Rajah Sahib Perhlad Sein v. *Maharajah Rajendar Kishore Singh* (1), *Dawkins* v. *Lord Penrhyn* (2), and *Noyes* v. *Crawley* (3) cited.

THIS was a suit for the recovery of possession of four katas of land, on adjudication of rights thereto. The plaint alleged that the land in dispute (together with certain land adjoining, which is now the property of the defendant) formerly belonged to the plaintiffs' father; that the defendant purchased from the plaintiffs' father the land adjoining the land in dispute; and that he had, by falsely alleging that he had subsequently obtained the disputed land as a gift from the plaintiffs' father, got himself registered as the owner thereof under the provisions of Beng. Act VIII of 1876. The defence was, that the suit was barred by limitation, and that the plaintiffs' father had made a gift of the disputed land to the defendant. The Mun-

* Appeal from Appellate Decree, No. 394 of 1881, against the decree of J. F. Browne, Esq., Officiating Judge of the 24-Parganas, dated the 13th January 1881, reversing the decree of Baboo Prosunno Coomar Bose, Additional Munsif of Baroypore, dated the 24th March 1880.

(1) 12 Moore's I. A., 337. (2) 4 App. Cas., 51.

(3) 10 Ch. D., 31, 36.

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sif found that the suit was barred by limitation, and he dismissed the plaintiffs' suit, though he found the story of the gift not proved. On appeal, the District Judge reversed this decision, on the ground that the land having admittedly belonged to the plaintiffs' father, and the defendant's allegation of gift having failed, the plaintiffs were entitled to a decree.

The defendant appealed to the High Court, on the ground that the District Judge should have determined the question whether the plaintiffs had been in possession at any time within twelve years previous to suit, and that he ought not to have thrown the onus as to adverse possession, in the first instance, on the defendant.

Baboo *Opender Chunder Bose* for the appellant.

Baboo *Gopinath Mookerjee* for the respondents.

The judgment of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

PRINSEP, J.—This is one of the many cases that have recently been before the Courts arising out of the Land Registration Act. The defendant succeeded, as against the plaintiffs, in getting his name registered as in possession of four katas of land.

The plaintiffs have brought the present suit to obtain possession by proof of title, alleging that the registration-proceedings were their cause of action,—that is to say, as we understand it, that they were in possession up to the date on which those proceedings were taken. The defendant says, that he has been in possession for the last twenty-five years under a verbal gift made in his favour by one who is said to have been the plaintiffs' ancestor.

Now the first point which the District Judge had to decide was whether, under such circumstances, the plaintiffs have proved that they were in possession of the land in dispute within twelve years from the institution of the suit. The possession set up by the plaintiffs is, that they excavated this land for the purpose of obtaining bricks, which were buried there. The Munsif found that this was false. The District Judge comes to no

very definite finding on this point, though, so far as we can learn his opinion, he seems to have thought that it was not true; but, that however that might be, the plaintiffs' real cause of action was the registration-proceedings. To make out his cause of action in a case of this kind, the plaintiff had to show the date on which he was dispossessed,—that to is say, to show that either on the particular date on which he stated the dispossession to have taken place, or some other period within twelve years from the date of the institution of the suit, he was in possession of this land. As an authority for this view of the law we would refer to the judgment of the Privy Council in the case of *Rajah Sahib Perhlad Sein* v. *Maharajah Rajender Kishore Singh* (1), *Dawkins* v. *Lord Penrhyn* (2), and *Noyes* v. *Crawley* (3). In the present case, until the plaintiffs could show that their suit was not barred by limitation,—that is to say, that they were in possession within twelve years from the date of the institution of the suit,—they could not call upon the defendant to prove his title under the alleged verbal gift. We, therefore, remand this case to the lower Appellate Court, that it may re-try the appeal in accordance with the above observations. Costs to follow the result.

Case remanded.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

BROJO GOBIND SHAHA (DEFENDANT) *v.* GOLUCK CHUNDER SHAHA, *alias* GOLUCK SHAHA (PLAINTIFF).*

1882
June 20.

Stamp Act (I of 1879)—Stamp-Duty—Hathchitta—Evidence—Acknowledgment.

An account in a *hathchitta*, showing advances of money made to, and part-payment made by, the defendant, the whole amount being in the handwriting and signed by the defendant, is admissible in evidence without being stamped.

Brojender Coomar v. *Bromomoye Chowdhrani* (4) followed.

* Appeal from Appellate Decree, No. 1820 of 1880, against the decree of W. F. Meres, Esq., Officiating Judge of Tippera, dated the 25th August 1880, affirming the decree of Baboo Kali Dass Dutt, Second Subordinate Judge of that district, dated the 6th August 1879.

(1) 12 Moore's I. A., 337.
(2) 4 App. Cas., 51.
(3) 10 Ch. D., 31, 36.
(4) I. L. R., 4 Calc., 885; 3 C. L. R., 520.

1882

BROJO GOBIND SHAHA v. GOLUCK CHUNDER SHAHA.

THIS was a suit to recover the sum of Rs. 1,430, being the balance of a sum of money lent and advanced by the plaintiff to the defendant on the 6th of Bysack 1283 (17th of April 1876). The plaint stated that the defendant, "as evidence of that transaction, opened a hisab (or account) in a khata-book in favour of the plaintiff." This hisab is thus described by the Subordinate Judge:—"The hisab is written in one of the pages of the khata-book. The words used there are exactly these—'Account (of money) due to Goluck Shaha by Brojo Gobind Shaha,' and below this is written the word 'Cr.' on the left side, and the word 'Dr.' on the right side, in the usual way. Beneath the word 'Dr.' are inserted the following words:—'The 6th Bysack. Cash received in person (1,250) twelve hundred and fifty, due by me, payable with interest at the rate of 1 rupee and 12 annas.' On the left side, under the word 'Cr.' is entered a sum of Rs. 400, paid on two dates, and at the top is signed the name of Brojo Gobind Shaha, the defendant. But there is no time specified for the repayment of the money, nor are the names of witnesses therein." It was proved that the defendant had received the money, and that the hisab was throughout in his handwriting.

Previously to the institution of the suit, the hisab had been presented to the Collector for the purpose of being stamped on payment of a penalty; and this officer held, according to the decision in *Ferrier* v. *Ramkalpa Ghose* (1), that the hisab, or account in question was one falling within the meaning of cl. ii, sched. ii, Act XVIII of 1869; that the omission to put on a stamp at first was not a material one; and that the document should be stamped with an 8-anna stamp. It was contended before the Subordinate Judge that the hisab was a promissory note; that, as such, it should have been stamped with a 1-anna stamp, that the action of the Collector was illegal under s. 20, Act XVIII of 1869; and that, therefore, the document must not be admitted in evidence, citing *Prosunnonath Lahiree* v. *Tripoora Soonduree Debia* (2), *Ankur Chunder Roy Chowdhry* v. *Madhub Chunder Ghose* (3), *Grindra Coomar Dutt*

(1) 23 W. R., 403. (2) 24 W. R., 88.
(3) 21 W. R., 1.

Chowdhry v. *Mohessur Bhuttacharjee* (1), and the Circular Order of the High Court, dated the 12th of May 1876, passed in accordance with para. 69 of the Circular Order of the Sudder Board, dated the 23rd of March of the same year. The Subordinate Judge overruled the contention, and gave the plaintiff a decree. On appeal, the Officiating Judge considered the document was a promissory note, but feeling bound by the decision in *Ferrier* v. *Ramkalpa Ghose* (2), which he considered to be in point, he affirmed the decree of the Court below with costs. The defendant appealed to the High Court.

Mr. *Montriou* and Baboo *Sreenath Doss* for the appellant.

Baboo *Kali Mohun Dass* for the respondent.

The judgment of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

PRINSEP, J.—It is contended before us in appeal that the document upon which the plaintiff sues is a "promissory note," and that being so, it should have been stamped, and that the Collector, at a subsequent period, was unable to order it to be stamped on payment of a penalty. It appears to us, however, that the document before us cannot be so regarded. It is exactly of the same nature as the document which forms the subject of the suit in the case of *Brojender Coomar* v. *Bromomoye Chowdhrani* (3). In that case White, J., in delivering the judgment of the Court, expressed himself in the following terms: "Now, if any one of the entries in the hathchitta had stood alone, and had been intended by the parties to form an isolated entry in the book, it might have been contended with considerable force that it fell within the description of document mentioned in the 5th article as requiring a stamp. We think, however, that the entries cannot be detached from the account of which they form a part. That account has two sides to it, the one headed 'amount advanced,' and the other 'amount received.' The amount due varies from time to time,

(1) 19 W. R., 246. (2) 23 W. R., 403.
(3) I. L. R., 4 Calc., 885; 3 C. L. R., 520.

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and depends upon the relation of the amount advanced to the amount received. In the present case no sum is entered under the head of 'amount received,' but that is an accident and makes no difference in considering the question as to what is the nature of the document which is offered in evidence." The only difference between that case and the one now before us is, that, in the heading of the 'amount received,' there are two payments on the part of the debtor, amounting in all to Rs. 400. Being accordingly of opinion that the document in this case is not a "promissory note," we think that the judgment of the lower Appellate Court is correct, and dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Tottenham and Mr. Justice O'Kinealy.

1882 *June* 14.

ERTAZA HOSSEIN AND ANOTHER (DEFENDANTS) *v.* BANY MISTRY (PLAINTIFF).*

Suit for Possession—Previous Dispossession—Limitation—Adverse Possession—Onus.

Where, in a suit for the recovery of land, based on title, the plaintiff alleges that he has been in possession of the land and was dispossessed therefrom by the defendant within twelve years prior to the institution of the suit, mere proof of such possession will not be sufficient to entitle the plaintiff to a decree.

Wise v. *Ameerunnissa Khatoon* (1) followed. *Kawa Manji* v. *Khowaz Nussio* (2) disapproved.

IN this case the plaintiff alleged that, from a long time, he had a dwelling-house on six katas of land in Mauza Allygunge, the property of Juggunnath Sahoy and other proprietors; that the defendants dispossessed him of a portion in the month of November 1877; and he instituted the present suit on the 18th of March 1879, claiming an adjudication of his right to the land on the ground of long previous possession. The defence

* Appeal from Appellate Decree, No. 318 of 1881, against the decree of Moulvi Hafez Abdool Kareem, Subordinate Judge of Bhagalpore, dated the 20th December 1880, affirming the decree of Moulvi Ameer Ally, Sudder Munsif of that District, dated the 12th September 1879.

(1) L. R., 7 I. A., 73. (2) 5 C. L. R., 278.

was, that the land claimed was the defendants' land, and formed part of the defendants' Mauza of Hobeebpore. The Munsif gave the plaintiff a decree for the portion claimed. On appeal the Subordinate Judge found that the defendants had dispossessed the plaintiff as alleged; that the plaintiff had not proved twelve years' possession prior to the act of dispossession; and he remanded the case to the lower Court in order that the Munsif should find on the evidence as it then stood, whether the disputed land formed part of Mauza Allygunge or of Mauza Hobeebpore. This the Munsif was unable to do, and the Appellate Court holding that the previous possession of the plaintiff threw upon the defendants the onus of showing title to the land, gave a decree in favour of the plaintiff, citing *Kawa Manji* v. *Khowaz Nussio* (1). The defendants appealed to the High Court.

The judgment of the Court (TOTTENHAM and O'KINEALY, JJ.) was delivered by

TOTTENHAM, J.—We think that the judgment of the lower Appellate Court in this case cannot be supported.

The question in dispute was, whether the land belonged to the village of Allygunge or that of Hobeebpore. The plaintiff sued to recover it on the ground that it belonged to Allygunge; and that he held it under the proprietors of that mauza, and for a long time. It, therefore, was incumbent upon him, in our opinion, to prove either that the land in fact belonged to Allygunge, or that he had enjoyed possession of it adversely to the defendants for at least twelve years. The proprietors of Allygunge were not parties to the suit. The proprietors of Hobeebpore were the defendants.

The lower Appellate Court found as a fact that the plaintiff had not made out twelve years' adverse possession. The Subordinate Judge, therefore, remanded the case to the Munsif for an enquiry as to which mauza the land belonged. The result was that the Munsif professed himself unable to determine that point. The Subordinate Judge agreed with him that, upon the evidence, it was not possible to say to which mauza

(1) 5 C. L. R., 278.

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ERTAZA HOSSEIN v. BANY MISTRY.

the land belonged. But it must be observed that, by his remand order, the Subordinate Judge had precluded the parties from adducing evidence on the point which had to be determined. It does not follow, therefore, that if an opportunity of adducing all the evidence available had been given, there might not have been enough to enable both the Munsif and the Subordinate Judge himself to come to a decision upon the point. But the lower Appellate Court apparently thought it immaterial which mauza comprised the land in question, for it thought that it could decide in the plaintiff's favour upon the strength of a decision of a Division Bench of this Court in the case of *Kawa Manji* v. *Khowaz Nussio* (1). There it appears to have been held that a plaintiff having once established that he had been in possession and had been dispossessed, his possession was enough to prove his title *primâ facie*, and to throw upon the other side the burden of proving a better title. In this case the Subordinate Judge found that the plaintiff had been in possession, and that he had been dispossessed; and he held, that mere possession was sufficient evidence of title, and it was for the other side to prove a better title. The defendants having failed to prove a better, the Subordinate Judge confirmed the decree of the first Court. But the decision of this Court, to which the lower Appellate Court refers, is not in accordance with the decision of the Privy Council in the case of *Wise* v. *Ameerunnissa Khatoon* (2). Their Lordships quoted and approved of the observations made in the case before them by the Judges of this Court, to the effect that mere possession would not prove any title, and would not entitle a plaintiff to obtain a decree for recovery of possession excepting under the special Statute which entitles him to recover possession if the suit is brought within a certain time from the date of dispossession. But while we think that the decision of the lower Appellate Court cannot be sustained, we think also that the plaintiff is entitled to have the suit tried upon the real point in issue,—namely, to which mauza the land in question belongs, to Allygunge or Hobeebpore; and for that purpose the case must go back to the first Court. We are also of opinion that the pro-

(1) 5 C. L. R., 278. (2) L. R., 7 I. A., 73.

prietors of Mauza Allygunge ought to be made parties to this suit. The Munsif should, therefore, issue a notice to them to show cause why they should not be made co-plaintiffs; and in case they refuse, he should make them defendants, so that the point in issue may be determined in their presence as well as in that of their adversaries, the proprietors of Hobeebpore, who are already defendants. On their being made parties, the whole case will be re-opened. Costs will abide the result.

Case remanded.

Before Mr. Justice Tottenham and Mr. Justice O'Kinealy.

PUDDOLABH ROY (DEFENDANT) *v.* RAMGOPAL CHATTERJEE AND OTHERS (PLAINTIFFS).*

1882
June 9.

Act XX of 1863, *s.* 14—*Jurisdiction—Leave to Sue—Suit by Committee.*

A committee appointed under Act XX of 1863 may, without leave of the Court previously obtained, sue their manager, or superintendent, for damages for misappropriation, and for an injunction. The provisions of Act XX of 1863, s. 14, do not apply to such suits by the committee themselves.

THIS was a suit, by the members of a committee appointed under Act XX of 1863, to obtain an injunction against the defendant, to restrain him from styling himself or acting as superintendent, or *paricha*, of the Sutiabadi Muth, and to recover from him a large sum of money on account of waste and misappropriation of the temple-funds committed by him. The facts of the case and the contentions raised on behalf of the defendant are fully set out in the judgment of Mr. Justice TOTTENHAM. The suit, which was in respect of a temple of the description provided for in s. 3, Act XX of 1863, was instituted in the Court of the Subordinate Judge of Cuttack without the leave of the District Judge having been previously obtained. The Subordinate Judge refused to entertain the question of damages, no leave to sue having been obtained; but he granted the injunction prayed for, "with costs in propor-

* Appeal from Appellate Decree, No. 1734 of 1880, against the decree of A. W. Cochrane, Esq., Officiating Judge of Cuttack, dated the 26th May 1880, confirming the decree of W. Wright, Esq., Subordinate Judge of that district, dated the 30th June 1879.

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tion," citing *Chinna Rangaiyangar* v. *Subbraya Mudali* (1), *Janardhana Embrandri* v. *Palakil Kesava Embrandri* (2), *Syed Amin Sahib* v. *Ibram Sahib* (3), *L. Venkatasa Naidu* v. *Sadagopasamy Iyer* (4) and distinguishing *Local Agents of Zillah Hoogly* v. *Kishnanund Dundee* (5). On appeal this decision was affirmed, and the appeal dismissed with costs. The defendant appealed to the High Court.

Mr. *Twidale* for the appellant.

Baboo *Hem Chunder Banerjee* and Baboo *Umbica Churn Bose* for the respondents.

The judgment of the Court (TOTTENHAM and O'KINEALY, JJ.) was delivered by

TOTTENHAM, J.—The plaintiffs in this suit stated that they were appointed a committee under Act XX of 1863 of the temple of the idol Gopinath. They said that the defendant was the highest officer in the temple appointed by the former local agents and confirmed by themselves, and that his duty was, under their supervision, to look after the *sheba* of the idol and to collect the rents, &c. They say that he became incompetent for the discharge of his duties and mismanaged affairs; and that, consequently, the committee dismissed him from office on the 15th November 1876. Notwithstanding his dismissal, the plaintiffs say, that the defendant continued exercising the same rights and enjoying the same perquisites and so forth that he had during his incumbency as superintendent; and that he was causing waste of the property of the idol. They therefore brought a suit asking for an injunction against the defendant, directing him not to assume the official designation of the superintendent of the idol; not to exercise any authority over the property of the idol, and in short not to interfere in any way. They also ask for a decree for the sum of Rs. 1,882-9-6, which was the estimated loss sustained by the idol in consequence of

(1) 3 Mad. H. C. R., 334.
(2) *Id.*, 198.
(3) 4 Mad. H. C. R., 112.
(4) *Id.*, 404.
(5) S. D. A., 1848, pp. 253, 255

the defendant's improper exercise of authority subsequent to his dismissal; and they asked for the costs of their suit.

The defendant took various preliminary objections to the suit. He urged that the plaintiffs had not dismissed him, and that they were not competent to dismiss him under Act XX of 1863 except by a suit. He denied the alleged misappropriations and mismanagement; and, with reference to that, he pleaded that the old local agents very judiciously decided that, after making provisions for the offerings better than what the idol had before, and after making arrangements for the *sheba* of the idol, he should take the balance of the profits as a remuneration for his labour. That order, he said, was final; and, in the last paragraph of his written statement, he alleged that the idol in question was his ancestral family god; that the debutter properties were given by his ancestor; and that he has the right and full power to manage the *sheba* and to spend money.

At the trial in the Subordinate Judge's Court an objection was taken that the suit would not lie in that Court at all; that, supposing that the endowment comes under Act XX of 1863, such a suit could only be brought in the Court of the District Judge, and by his permission. The Subordinate Judge held that the suit would lie in his Court, and did not require the sanction of the District Judge, so far as the prayer for an injunction was concerned; and as regards the sum claimed as damages, the Subordinate Judge found, *first*, that there was no proof of any such misappropriation as the defendant was charged with; and *secondly*, that, if there had been any proof of that, a suit would not lie without the sanction of the District Judge in respect of that claim. The result was that the Court gave a decree for the injunction only, with costs of suit in proportion. The defendant appealed to the District Judge and took the same grounds,—*viz.*, that the suit is bad in law as having been brought in the wrong Court, and without the necessary sanction. He did not very clearly take the objection that this property did not come under the operation of Act XX of 1863, but he did say that the committee had no power to dismiss him; and in appeal before us it was contended that that objection was broad enough to cover the objection that the endow-

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ment did not come under that Act. But we may observe that the very point of his objection was based upon the assumption that the case would come under the Act. Unless Act XX of 1863 governed the endowment, his objection that a suit in respect of it would not lie, and that if a suit did lie it should be brought in the Court of the District Judge, would have no possible foundation. The District Judge confirmed the decree of the first Court, both as to the injunction and as to costs.

In appeal before us four points are pressed upon our attention: *first*, that the suit would not lie in the Subordinate Judge's Court, but only in the District Judge's Court, under the Act; and that, as the first Court found that one portion of the claim was bad for the reason that it was brought in the wrong Court and without sanction, the whole suit should have been dismissed; *secondly*, it was contended that the endowment was not a public endowment at all, and that the committee under Act XX of 1863 had no power to deal with it or with the defendant; *thirdly*, it was contended that the decree was bad, because while it prohibited the defendant from continuing the management of the service of the idol, it made no provision for anybody else to do so; and *lastly*, it was objected that the order as to costs was wrong. As to the third objection, *viz.*, as to the effect of the decree, we think it unnecessary to discuss that point at any length, because it does not seem to us to be competent to the appellant to object to the decree on that ground If it was right so far as the injunction against himself goes, it does not matter to him who succeeds him, or whether anybody is appointed or not.

On the first point, *viz.*, as to the jurisdiction of the Subordinate Judge to try the case, we think, upon the construction which we put upon the Act, and looking to the authorities on the subject, that there is no doubt whatever that this suit was properly brought in the Subordinate Judge's Court, and that it did not require the sanction of anybody. The section relied upon by the appellant is s. 14. We think that that section is merely an enabling section intended to allow suits to be brought by any person interested in the endowment, against the members of the committee themselves or any of those who are engaged in managing or superintending the affairs of the

endowment. We think that it was not intended by that section to take from the committee the power which would be inherent in them of their own authority to bring a suit in the ordinary Court against the manager in respect of moneys misapplied. We have been referred to various cases which fully support the opinion we have formed. On this point, therefore, we think that the appeal fails.

Then as to the question whether the endowment is a public endowment within the scope of Act XX of 1863, or whether it was the private property of the defendant, we have been asked to remand the case for the trial of this point, or else to say that, as the original defendant is now dead, and the point was not clearly raised and decided in the Courts below, there is no binding decision upon that point, and that it remains open for future litigation.

We think we ought not to assent to this course, because we think that the original defendant, who was the person to raise the issue, and to insist on having it tried out, if he thought fit to do so, did not really in his written statement contest the fact that the endowment was governed by s. 3 or 4, as the case may be, of Act XX. We find in various portions of his written statement that he expressly admits that he has been acting as superintendent appointed by the committee under Act XX, and by the local agents before them. In paragraph 12 especially, he expressly states that he was allowed by the previous local agents to appropriate to himself, as remuneration for his labour, the balance that remained after providing for the *sheba* of the idol; and at the trial he produced a proceeding of the Deputy Collector of the year 1846, and a proceeding of the Commissioner of the year 1859, which clearly set out that he was appointed by the Collector as local agent. We think, therefore, that it is much too late, and it was too late even at the commencement of the suit, for the defendant to pretend that he was independent of Act XX of 1863, and we must, therefore, disallow this point of the appeal.

The only matter as to which we think that the defendant has ground for complaint is as to the matter of costs; in that, while he has been saddled with the costs of the suit so far as it was

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decided against him, he has not been awarded costs on the amount as to which the suit was dismissed. The suit was mainly brought for an injunction against the defendant. That he got, but, besides that, the plaintiffs claimed a considerable sum, nearly Rs. 2,000, as damages; and that part of the claim was dismissed. The order of the Court below was not, as the appellant appears to imagine, that he should pay costs to the plaintiffs on the whole amount of the plaint.

The order was that costs should be given in proportion. Accordingly we find in the schedule of costs only Rs. 10 were paid in as the stamp-fee for the plaint, but Rs. 80 have been allowed as pleader's fees. Nothing has been allowed to the defendant in respect of the large portion of the claim which was dismissed. The Courts below have given no reason for departing from the usual rule in such cases, and it may probably have been by an oversight that they made no order for the defendant to get his share of the costs.

We think it right to amend the decree by saying that the parties will get their costs in proportion to their success respectively. The costs of this appeal will follow the same.

Appeal dismissed.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice McDonell.

1882 *June 6.*

YUSUF ALI AND OTHERS (PLAINTIFFS) *v.* THE COLLECTOR OF TIPPERA (DEFENDANT).*

Mahomedan Law—Gift, Requisites of—Gift in Futuro.

Under the Mahomedan law a gift is not valid unless it is accompanied by possession, nor can it be made to take effect at any future definite period.

A document, containing the words "I have executed an ikrar to this effect, that, so long as I live, I shall enjoy and possess the properties, and that I shall not sell or make gift to any one; but, after my death, you will be the owner, and also have a right to sell or to make a gift after my death," *held* to be an ordinary gift of property '*in futuro*,' and as such invalid under Mahomedan law.

* Appeal from Appellate Decree, No. 1294 of 1879, against the decree of J. C. Geddes, Esq., Officiating Judge of Comilla in Tippera, dated the 10th March 1879, reversing the decree of Baboo Umachurn Kastogiri, First Subordinate Judge of that District, dated the 28th June 1877.

THE facts found on remand in this case, after the hearing on appeal to the High Court, were as follows:—

That one Bhani Bebi held an absolute interest in certain properties given by her husband and in other properties which she had acquired by purchase out of funds allowed to her by him; and that she, being childless, out of natural love and affection, agreed to, and on the 19th Bhadro 1253 (3rd September 1846) entered into, an ikrar, under which she took a life-interest in these properties only, the remaining interest going to one Asfunnissa, another wife of Buksh Ali, the mother of the defendant; the words used being "I have executed an ikrar to this effect, that, so long as I live, I shall enjoy and possess the properties, and that I shall not sell or make gift to any one; but, after my death, you will be the owner, and also have a right to sell or to make gift after my death;" that this ikrar was duly executed by Bhani Bebi, and was explained to her, and that there was absolutely no trace of fraud in the transaction. The defendant, who was a lunatic, was represented by the Collector of Tippera.

This ikrar was impugned by the plaintiffs, who were the brothers and sisters of Bhani Bebi, and they disputed the order of the Collector, who had ordered the defendant to be registered as proprietor of the properties.

The point on which the case turned on appeal before the High Court was, whether such a voluntary relinquishment of her property on the part of Bhani Bebi was valid under the Mahomedan law.

Mr. *Ghose* (with him Mr. *Amir Ali* and *Moonshee Serajul Islam*) for the plaintiffs contended that the ikrar was invalid, as, under the general rule of Mahomedan law, any gift to be valid must be accompanied by immediate delivery of possession, see Chap. V of Macnaghten's Mahomedan Law, p. 50, and Baillie's Digest of Mahomedan Law, p. 250, 2nd Edn.; and that a gift cannot be postponed so as to make it take effect at any future definite period—*Rajah Syud Enaet Hossein* v. *Rance Roshun Jahan* (1), and on appeal, *Khajooroonissa* v. *Rowshan Jehan* (2).

(1) 5 W. R., 4. (2) I. L. R., 2 Calc, 184.

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As to immediate delivery of possession, see *Abedsonissa Khatoon* v. *Ameroonissia Khatoon* (1), *Obedur Reza* v. *Mahomed Muneer* (2), *Gulam Jafar* v. *Masludin* (3), and *Khader Hussain Sahib* v. *Hussain Begum Sahiba* (4). The case relied on by the other side will be *Nawab Umjad Ally Khan* v. *Mussamut Mohumdee Begum* (5), but the present case cannot be governed by it. The case of *Jeswunt Singjee Ubby Singjee* v. *Jet Singjee Ubby Singjee* (6) cannot be distinguished from the present case, and it was before the Privy Council at the trial of the case of *Nawab Umjad Ally Khan* v. *Mussamut Mohumdee Begum* (5). The Privy Council did not intend, in the case of *Nawab Umjad Ally Khan* v. *Mussamut Mohumdee Begum* (5), to depart from the rule laid down in the case of *Jeswunt Singjee Ubby Singjee* v. *Jet Singjee Ubby Singjee* (6). This ikrar is not a testamentary disposition; the legatee has not enjoyed possession, and there is no consent of the heirs; the donee in this case predeceased the donor. The Mahomedan law does not contemplate any other kind of disposition than a gift and a testamentary disposition. To show that the Mahomedan law is applicable, see the case of *Zohorooddeen Sirdar* v. *Baharoolah Sircar* (7).

The *Officiating Advocate-General* (Mr. *Phillips*, with him Baboo *Anoda Pershad Banerji*) for the respondent.—I submit the deed was a kind of family arrangement, and is not in any way governed by Mahomedan law. It is not in form or substance a gift; it is merely a definition as to what the wife's status was to be. It does not come within the definition of 'gift' according to the Mahomedan law, and if so, the Mahomedan law is not applicable. There are a number of cases which are not contemplated by Mahomedan law, such as trusts, &c.; but they are valid nevertheless. The case cited—*Zohoorooddeen Sirdar* v. *Baharoolah Sircar* (7)—came within the definition of 'inheritance,' the will there was capable of being revoked at any time during the life of the donor.

(1) 9 W. R., 257.
(2) 16 W. R., 88.
(3) I. L. R., 5 Bomb., 238 (242).
(4) 5 Mad. H. C. Rep., 114.
(5) 11 Moore's I. A., 517.
(6) 3 Moore's I. A., 245.
(7) W. R. for 1864, p 185.

If the rule of equity and good conscience is sufficient to let in the Mahomedan law of gifts in the case of Mahomedans, then, under that principle, the law of every nation with regard to gifts would be applicable in our Courts. A general rule of equity, which is applicable to Mahomedans, is laid down in *Stapilton* v. *Stapilton* (1), that family arrangements do not come within the rules relating to persons dealing with reversionary interests, and in the absence of undue influence on the part of the parent, will be binding. The transaction in the case of *Nawab Umjad Ally Khan* v. *Mussamut Mohumdee Begum* (2) is much the same as the transaction in the present case. That case was heard in Oude before the transfer to the East India Company, and it was for that reason that the Mahomedan law was applied.

The judgment of the Court (GARTH, C. J., and MCDONELL, J.) was delivered by

GARTH, C. J.—We thought it right in this case, when it first came before us on second appeal, to send it back to the District Judge, for the purpose of having these two material points more clearly ascertained:

1*st*—What interest had Bhani Bibi in the properties given her by her husband, and those purchased with her own money, at the time when she executed the ikrar of 1253? and

2*nd*.—Under what circumstances, and for what reason, did she execute that ikrar?

Upon these points the District Judge has found:

1*st*—That Bhani Bibi had an absolute, and not a life, interest only in the property in dispute up to the time when she executed the ikrar of 1253; and

2*ndly*—That the ikrar of 1253 was executed at the solicitation of her husband, but without any undue influence or fraud.

He says that the reason for her executing it seems to have been that, as she was then pretty well advanced in life, and had no children, her husband was anxious that the property which

(1) Cited in White & Tudor, Eq. Cas., 649.

(2) 11 Moore's I. A., 517.

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he had bestowed upon her should not pass away from his own children. He, therefore, induced her to convey it to herself for life, and after her death to his children by his other wife.

The District Judge finds, moreover, that the instrument was executed at Bhani Bibi's own residence, and in the presence of her husband, without any of her own relatives being present; that it was read over to her before she signed it; and that as to any fraud, compulsion, or undue influence, except the 'anurah' of her husband mentioned by the witness Deorga Churn, there is absolutely no trace.

These findings of the Judge completely dispose of the two material points which were raised before us on the former occasion. It is now clear that Bhani Bibi had an absolute and not a life estate in the property, and that the ikrar was not made in settlement of any dispute, or by way of compromise.

We thought it not improbable, that some dispute had arisen in the family as to whether she had a life-estate or not, or as to what her rights in the property really were; and if that had been so, and if the ikrar had been made for the purpose of settling those disputes, there might have been a good consideration for it. But these doubts are now set at rest by the finding of the District Judge.

We have, therefore, only to decide, as a matter of law, whether such voluntary relinquishment of her property on the part of Bhani Bibi was valid in point of law; and as to this it has been contended by the appellants:

1*st*—That, by Mahomedan law, a gift cannot be valid unless it is accompanied by possession; and

2*nd*—That it cannot be made to take effect at any future definite period.

There certainly seems no doubt as to the correctness of both these propositions. They are laid down very clearly in Baillie's Digest of Mahomedan Law, pp. 507 and 512, and in Macnaghten's Mahomedan Law, p. 50, Chap. V, paras. 3 and 4; and they are confirmed and exemplified by several authorities to which we have been referred. See *Nawab Umjad Ally Khan* v. *Mussamut Mohumdee Begum* (1), *Khader Hussain Sahib* v.

(1) 11 Moore's I. A., 517.

Hussain Begum Sahiba (1), *Rajah Syud Enaet Hossein* v. *Rajah Roshun Jahan* (2), and *Khajoorooniss a* v. *Rowshun Jehan* (3).

Indeed, the Advocate-General, who appeared for the respondent, scarcely attempted to dispute the general correctness of these propositions. But his main contention was, that the deed of gift by Bhani Bibi was the result of a family arrangement, and that, being of that nature, we ought to presume that it was made for good consideration.

There is no evidence, however, that it was the result of a family arrangement; and certainly the finding of the lower Court, which was directed to enquire into the circumstances under which it was made, affords no ground for that supposition. The disposition of the property was made by the lady at the request of her husband, and prompted, no doubt, by a very proper motive. She felt grateful to him for the generosity with which he had treated her, and was very ready to carry out his wishes by securing (as no doubt she intended to do), the reversion of the property after her death to her husband's family.

There is nothing, so far as we can see, in the form of the disposition to distinguish it from an ordinary gift of property *in futuro;* and, as such a gift is not valid by Mohamedan law, we must need reverse the judgment of the Court below, and confirm that of the Subordinate Judge with costs.

Appeal allowed.

Before Mr. Justice Mitter and Mr. Justice Maclean.

SHEO SHUNKUR SAHOY (DEFENDANT) *v.* HRIDOY NARAIN (PLAINTIFF).*

1882
April 14.

Suit for Damages—Splitting Claims—Civil Procedure Code (Act X of 1877), *s.* 43.

On the 27th Joist 1286 F. S. (2nd June 1879) the plaintiff brought a suit to recover damages for the breach of a contract on the part of the defendant, for not having made over possession to him of certain leasehold properties, the

* Appeal from Original Decree, No. 331 of 1880, against the decree of Baboo Koilash Chunder Mookerjee, Subordinate Judge of Tirhoot, dated the 3rd September 1880.

(1) 5 Mad. H. C. Rep., 114. (2) 5 W. R., 4, 19. (3) I. L. R., 2 Calc., 184.

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damages claimed being for the profits accrued due for the year 1283 F. S. (1875-6). In this suit he obtained a decree.

On the 21st Joist 1287 F. S (14th June 1880) the plaintiff brought another suit against the defendant to recover damages for the profits accrued for the years 1284, 1285, and 1286 F. S (1876-7 to 1878-9).

Held, that the plaintiff should have included the damages for the years 1284 and 1285 (1876-7 and 1877-8) in his former suit, and that he was debarred by s. 43 of Act X of 1877 from including in his second suit any portion of his claim for damages which had accrued due at the time of the institution of his first suit, and for which he had omitted to sue; but that he was entitled to recover damages for the year 1286 (1878-9).

Taruck Chunder Mookerjee v. *Panchu Mohini Debya* (1) followed.

THE defendant, on the 30th Shrabun 1282 F. S. (31st July 1875), executed a ticca patta in favour of the plaintiff, and thereby leased a certain mouza to him at an annual jama of Rs. 3,714 for a term of eleven years, beginning in 1283 (1875-6) and ending in 1293 (1886-7).

The defendant, however, neglected to give possession of the land leased to the plaintiff, and the latter brought a suit for possession, and obtained a decree giving him possession; and after appeal, was put into possession on the 18th June 1879. The plaintiff then, on the 27th Joist 1286 (2nd June 1879), brought a suit against the defendant to recover damages for the year 1283 (1875-6), during which year he had been kept out of possession, and obtained a decree on the 16th July 1879.

On the 21st Joist 1289 (18th June 1880), he again sued to recover damages and interest for the years 1284, 1285, and 1286 F. S. (1876-7 to 1878-9) during which time he was kept out of possession.

The defendant contended that the claim in this latter suit should have been included in the former suit, and it not being so included, the suit was barred under s. 43 of Act X of 1877.

The Subordinate Judge held, that the claim for damages was a cause of action recurring year by year; that the claim in suit related to a claim subsequent to the period covered in the former suit; and that, therefore, the suit was not barred under s. 42. He also held that the case was the converse of the illustration to s. 43 of the Code, and that, inasmuch as no claim

(1) I. L. R., 6 Calc., 791.

for damages for the year 1286 (1878-9) could have been raised in the former suit, he gave the plaintiff a decree for the greater part of the sums claimed by him.

The defendant appealed to the High Court.

Baboo *Unnoda Pershad Banerjee* and Baboo *Mohesh Chunder Chowdhry* for the appellant.

Baboo *Chunder Madhub Ghose*, Mr. *C. Gregory*, and Mr. *M. L. Sandel* for the respondent.

The judgment of the Court (MITTER and MACLEAN, JJ.) was delivered by

MITTER, J.—This is a suit for the recovery of damages from the defendant under the following circumstances:—A ticca patta was executed by the defendant in favour of the plaintiff on the 13th Shrabun 1282, stipulating that the plaintiff should remain in possession of the property leased from 1283 to 1293 on a fixed rent, which was to be applied to the payment of Government revenue, the interest upon the zurpeshgi-money, and other charges. The possession of the leasehold property not having been given to the plaintiff, a suit was brought to recover possession, and a decree was passed in his favour on the 19th of December 1877. On the 2nd of June 1879, corresponding with the 27th Joist 1286, a suit for the profits of the ticca lease for the year 1283 was brought by the plaintiff against the defendant, and a decree was obtained. The present suit was brought for the profits of the ticca for the years 1284 to 1286. An objection was taken in the lower Court that this suit was barred by the provisions of s. 43 of the Civil Procedure Code of 1877. This objection was overruled in the lower Court, which decreed the plaintiff's suit. In appeal this objection has been again taken before us, and we think that the contention of the appellant upon this point is valid, so far as the claim for 1284 and 1285 is concerned. It is supported by a decision of this Court in the case of *Taruck Chunder Mookerjee* v. *Panchu Mohini Debya* (1). That case is not distinguishable from the present in any respect. That was a suit for rent, and the present is

(1) I. L. R., 6 Calc., 791.

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a suit for damages, and if there be any distinction, the distinction is against the plaintiff. Section 43, as it stood when the suit of 1879 was brought, was to the following effect: "Every suit shall include the whole of the claim arising out of the cause of action, but a plaintiff, &c., &c. If a plaintiff omits to sue for, or intentionally relinquish any portion of his claim, he shall not afterwards sue for the portion so omitted or relinquished."

Now what was the cause of action in the former suit which was brought on the 2nd of June 1879? The cause of action was the breach of contract on the part of the defendant in not having made over possession of the leasehold property to the plaintiff. The particular amount which should have been claimed in that suit was the amount of damages which had then accrued from the wrongful act of the defendant. In measuring the amount of the damages, if the plaintiff chose only to include the profits of 1283, he certainly cannot bring a second suit for any portion of the claim which had thus accrued due, and for which he omitted to sue.

The suit was brought in the month of Joist 1286, and it was incumbent upon the plaintiff, under s. 43, to include in his claim the whole amount of damages sustained by him up to the date when that suit was brought. There is no question that the damages for the years 1284 and 1285 had then accrued due, therefore the plaintiff cannot successfully claim these damages in this suit. But it has been further contended that the damages for the year 1286 also had accrued due then, because the suit was brought in the last month of the agricultural year 1286. But we have no evidence on the record from which we can say that, on the 27th Joist 1286, the plaintiff, if he had been in possession, could have realized the whole or any portion of the rents and profits of that year of the leasehold property. Then it is further contended that the plaintiff could have at least claimed the interest due to him up to the month of Joist 1286, and that, therefore, to that extent the claim for the year 1286 should be disallowed.

Now, in the former suit for the damages of 1283, the Court decided that, according to the terms of the agreement, the

interest would not fall due till the end of the year. The parties are bound by that decision. Therefore no portion of the claim for 1286 is shown to have accrued due on the 27th Joist 1286, when the first suit for damages was brought. This part of the claim is, therefore, not affected by the provisions of s. 43.

The plaintiff has taken objection to the finding of the lower Court as to the amount of damages, but we are of opinion that there is no valid ground for impugning the correctness of the lower Court's decision upon this point.

We, therefore, reverse the decree of the lower Court so far as it relates to the years 1284 and 1285, and dismiss the plaintiff's suit for these years. The decree of the lower Court in respect of the year 1286 is confirmed. The plaintiff will pay and receive costs in both Courts in proportion to the claim dismissed and decreed.

Decree modified.

Before Mr. Justice Mitter (Officiating Chief Justice) and Mr. Justice Norris.

GUNESH DASS (PLAINTIFF) *v.* GONDOUR KOORMI (DEFENDANT).*

1882
July 19.

Breach of Contract in Planting Trees on Land let for Agricultural Purposes—Beng. Act VIII of 1869, *s.* 27—*Act X of* 1859—*Limitation Act* (*XV of* 1877), *sched. ii, art.* 120.

Section 27 of Beng. Act VIII of 1869 only relates to such suits as could be brought either by the landlord or tenant under Act X of 1859, and will not apply to an alternative claim, put forward in a suit for ejectment, to compel the defendant to remove trees from certain lands leased to him for agricultural purposes. Article 120 of sched. ii of Act XV of 1877 is applicable to such claims.

THIS was a suit brought on the 13th Bysack 1286 (19th April 1879) to eject the defendant from two plots of land, on the ground that he had committed a breach of contract in planting trees on this land which had been leased out to him for agricultural purposes only.

* Appeal from Appellate Decree, No. 925 of 1881, against the decree of H. W. Gordon, Esq., Officiating Judge of Tirhoot, dated the 28th February 1881, affirming the decree of Baboo Biij Mohun Persad, Munsif of Durbhunga, dated the 27th December 1879.

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The plaintiff alleged that the trees were planted on plot No. 1 in 1284 F. S. (1876-7), and on plot No. 2 in 1281 F. S. (1873-4), and he asked that the defendant might be ejected, or in the alternative that the defendant might be compelled to remove the trees.

The defendant pleaded limitation, contending that the trees were planted on plot No. 1 in 1282 F. S (1874-5), and on plot No. 2 in 1274 F. S. (1866-7).

The Munsif found that the suit in respect of plot No. 2 was barred by limitation, more than twelve years having elapsed since the trees were planted; but as regards plot No. 1 he held, that the suit was in time, and therefore gave the plaintiff a decree, ejecting the defendant from plot No. 1, and ordering the removal of the trees.

Both the plaintiff and the defendant appealed to the District Judge. The Judge dismissed the plaintiff's appeal and decreed that of the defendant, directing the dismissal of the whole of the plaintiff's suit as being barred by s. 27 of Beng. Act VIII of 1869.

The plaintiff appealed to the High Court.

Baboo *Taruck Nath Palit* for the appellant.

Baboo *Pran Nath Pundit* for the respondent.

The judgment of the Court (MITTER, Offg. C. J., and NORRIS, J.) was delivered by

MITTER, Offg. C.J.—This was a suit brought by the plaintiff to eject the defendant from two plots of land constituting his holding. The suit was based upon the ground that, under a contract, or according to the custom of the country, the defendant was bound to use the land of his holding for agricultural purposes only; but that the defendant, in contravention of this condition, planted trees upon the land in dispute, and converted it into a garden.

The plaintiff alleged that this planting of trees took place in October 1876. The suit was brought on the 19th of April 1879. The plaintiff in his plaint sought for two reliefs. He

asked first for the ejectment of the defendant, and if the defendant was not liable to be ejected, he next asked in the alternative that the defendant should be compelled to remove the trees planted by him.

As regards one of the plots in dispute the Munsif found that the planting of the trees had taken place more than twelve years before the date of this suit. He accordingly dismissed the plaintiff's suit in so far as it related to this plot. But with reference to the other plot he found that the trees were planted on it within twelve years from the date of the suit, and that, therefore, the suit was not barred by limitation. Upon the merits the Munsif finding that the plaintiff's allegation was made out, awarded a decree in his favour.

Against that decree, which was partly in favor of the plaintiff and partly in favour of the defendant, both the plaintiff and the defendant appealed to the District Judge.

The District Judge dismissed the plaintiff's appeal and decreed that of the defendant, directing the dismissal of the whole of the plaintiff's suit, on the ground that it was barred by limitation under the provisions of s. 27 of Beng. Act VIII of 1869. He came to this conclusion, because, on the face of the plaint, the suit was brought more than one year after the alleged planting of trees.

Section 27 of Beng. Act VIII of 1869 only relates to such suits as could be brought either by the landlord or tenant under Act X of 1859. The claim of the plaintiff so far as it seeks to eject the defendant was a claim which was cognizable under Act X of 1859, and therefore we are of opinion that the decision of the District Judge, so far as it disallows the claim of the plaintiff for ejectment of the defendant, is correct.

But s. 27 of Beng. Act VIII of 1869 will not apply to that part of the plaintiff's claim in which he seeks to compel the defendant to remove the trees, because a suit of that nature was not cognizable under Act X of 1859. Therefore, so far as that part of the plaintiff's claim is concerned, the decision of the lower Appellate Court is not correct.

Then the question arises, what article of the Limitation Act of 1877 governs this part of the plaintiff's claim?

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It was contended on behalf of the defendant that art. 31 of sched. ii of that Act applies.

We are clearly of opinion that this contention is not correct, and we are supported in this opinion by the decision in the case of *Kedar Nath Nag* v. *Sritirutno* (1). In our opinion art. 120 governs this part of the plaintiff's case; and the lower Appellate Court will have to determine whether it is barred under that article or not.

We, therefore, set aside the decision of the lower Appellate Court so far as it dismisses the plaintiff's claim to compel the defendant to remove the trees, and remand this case to that Court for retrial with reference to that relief. The costs will abide the result.

It is admitted that the appeals, numbered from 926 to 933 both inclusive, will be governed by this decision. The same order will be made in those cases also.

Case remanded.

Before Mr. Justice Mitter (Officiating Chief Justice) and Mr. Justice Norris.

1882 *July* 19.

EDUN (DEFENDANT) *v.* MAHOMED SIDDIK AND OTHERS (PLAINTIFFS).*

Suit to compel Registration—Registration Act (III of 1877), ss. 73, 77.

Under the Registration Act of 1877, a suit to compel registration is maintainable only when the provisions of s. 77 of the Act have been complied with. A person omitting to make an application to the Registrar as provided by s. 73, within the time provided by s. 72, cannot be said to have complied with the conditions precedent to a suit under s. 77. Independently of ss. 77 of the Act, no suit will lie.

Bhagwan Singh v. *Khuda Baksh* (2) followed.

Ram Ghulam v. *Chotey Lal* (3) dissented from.

THIS was a suit to compel the defendant to register a certain mokurari lease granted to the plaintiff on the 27th of January 1880. The plaintiffs alleged that they filed the lease in the Sub-

* Appeal from Appellate Decree, No. 672 of 1881, against the decree of H. Beveridge, Esq., Officiating Judge of Patna, dated the 27th January 1881, reversing the decree of Baboo Kedarnath Roy, Third Munsif of Patna, dated the 11th August 1880.

(1) I. L. R., 6 Calc., 34. (2) I. L. R., 3 All., 397.

(3) I. L. R., 2 All., 46.

Registrar's office at Patna on the 31st of January 1880, but that the defendant appeared and denied execution, and that the Sub-Registrar, on the 9th of February 1880, refused registration. On the 8th of April 1880, the plaintiffs applied under s. 73 to the Registrar to establish his right to registration, but the Registrar held that the application was made out of time,—*i.e.*, more than thirty days after the date of the refusal to register.

The plaintiffs then brought this suit under s. 77 of Act III of 1877 to compel registration. The defendant denied execution of the deed, and contended that the suit was barred.

The Munsif found that a Civil Court could not direct the registration of an instrument of which registration had been refused, and as to which the person complaining of non-registration had not presented an application under s. 73 to the Registrar in time; that such an order would, if made, override the express provisions of limitation set out in the Registration Act, and held that the suit was barred, inasmuch as the application under s. 73 was not presented within thirty days after the Sub-Registrar had refused registration; and that the question could not be contested in a regular suit. The plaintiffs appealed to the District Judge, who overruled the Munsif's decision, holding, on the authority of *Ram Ghulam* v. *Chotey Lal* (1), that the sections of the Registration Act were merely permissive, and would not exclude such a suit as the one before him for the enforcement of the contract of sale, which included the obligation to register, and that although the plaintiffs might have been out of time under the Registration Act, yet they were at liberty to bring a regular suit for the purpose of enforcing the contract.

The defendant appealed to the High Court.

Baboo *Saligram Singh* for the appellant.

Mr. *Twidale* for the respondents.

The judgment of the Court (MITTER and NORRIS, JJ.) was delivered by

MITTER, J.—This is an appeal against the decree of the District Judge of Patna, reversing the decision of the Munsif,

(1) I. L. R., 2 All., 46.

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by which the plaintiffs' suit was dismissed. The decree appealed against is in these words :—" Defendant must cause registration of the deed and delivery of it, and put the plaintiffs in possession of the thing sold, and then plaintiffs will pay to her, or into Court, the Rs. 20 still due."

The plaintiffs brought this suit to compel the defendant to register a mokurari patta alleged to have been executed by her in their favour. It was alleged in the plaint that the defendant agreed to grant a mokurari patta of the property in dispute on a bonus of Rs. 100; that, according to this agreement, a mokurari patta was executed by the defendant on the 27th of January 1880; that, on that date, Rs 80, out of Rs. 100, were paid, and the mokurari patta was made over to the plaintiffs; that the said document was filed by the plaintiffs in the Sub-Registry Office at Patna on the 31st of January 1880; that the defendant, in accordance with a summons issued upon her by the Sub-Registrar, appeared before that officer and denied the execution of that document. The Sub-Registrar, on the 9th of February following, refused registration. Against the order of the Sub-Registrar the plaintiffs preferred a complaint to the Registrar, by a petition dated the 8th April 1880. The Registrar, on the 28th of May 1880, refused to adjudicate upon the complaint, and rejected the application as it was made more than thirty days after the Sub-Registrar's refusal. Then the present suit was brought on the 5th of June 1880.

The question raised in the lower Court was, whether, under the circumstances stated above, the suit was maintainable. The Munsif being of opinion that the suit was not maintainable, dismissed it upon that amongst other grounds. The District Judge on appeal has overruled the Munsif's decision upon this point. We are of opinion that the Munsif's decision upon this point is correct.

We entirely agree in the reasons given by the Allahabad High Court in *Bhagwan Singh* v. *Khuda Baksh* (1), which supports the Munsif's view of the law. Under the Registration Act of 1877, such a suit as this is maintainable only when the provisions of s. 77 have been complied with. The District

(1) I. L. R., 3 All., 397.

Judge, relying upon a decision of *Ram Ghulam* v. *Chotey Lal* (1), was of opinion that the sections of the Registration Act are merely permissive, and that a suit of this nature is maintainable, although it does not come within the purview of s. 77. The decision cited by the learned Judge fully supports his view; but with deference to the learned Judges of the Allahabad Court, we find ourselves unable to agree in the view of the law taken in that case.

The most formidable objection to the maintenance of a suit of this nature lies in the circumstance that, under the Registration Act, the mokurari patta cannot be received in evidence, because it has not been duly registered under its provisions. The patta being not receivable in evidence, the main allegation upon which the plaintiffs' suit is based, *viz.*, that a mokurari grant was made, is not capable of proof. It was upon this ground that a Full Bench of this Court, in the case of *Sheikh Rahmatulla* v. *Sheikh Sariutulla Kagchi* (2), held, that a suit like the present would not lie.

Then again, under s. 34 and s. 23 of the Registration Act of 1877, the Registering Officer is prohibited, subject to certain specified exceptions, from registering a document, unless it be presented for registration, and unless the persons executing such document or their representatives, assigns or agents authorized under the Act, appear before him within four months from the date of its execution. It may be that that period may lapse before a decision is arrived at by a Civil Court in a suit of this description. Should the Court in that case direct the Registering Officer to register the document in spite of the provisions of the Registration Act?

Similarly, under the second para. of s. 71, a Registering Officer, after he has refused registration, and endorsed on the document the words 'registration refused,' is prohibited from accepting for registration a document so endorsed unless and until, under the provisions contained in the Act, the document is directed to be registered. In the place of this prohibition, is the Civil Court competent to direct the registration of a docu-

(1) I. L. R., 2 All., 46. (2) 1 B. L. R., F. B., 58.

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ment, although no steps have been taken under the provisions of the Registration Act to obtain an order for registration?

These considerations clearly show that a suit like the present, independently of s. 77 of the Registration Act, will not lie.

In this case the plaintiffs cannot succeed under s. 77 of the Act, because they did not comply with the conditions precedent to the maintenance of a suit under that section. But it has been said that those conditions were complied with, because an application was made to the Registrar complaining of the Sub-Registrar's order refusing registration. This argument is not valid; the application referred to above was not made within the time allowed by the Act. Under these circumstances we are of opinion, that it cannot be said that the plaintiffs have complied with the conditions precedent for the maintenance of a suit under s. 77.

The decision of the Munsif was, therefore, right; and the District Judge was in error in reversing it. The appeal is decreed with costs.

Appeal allowed.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Mitter, Mr. Justice Wilson, Mr. Justice Tottenham, and Mr. Justice Maclean.

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TINUMONI DASI (PLAINTIFF) *v.* NIBARUN CHUNDER GUPTA AND OTHERS (DEFENDANTS).*

Hindu Law — Succession by Daughter before her Marriage—Subsequent Marriage and Birth of Son—Death of such Daughter—Succession of Married Sister.

On the death of a daughter, who had succeeded before her marriage to her father's estate, to the exclusion of her married sister, the estate so inherited by her devolves upon her married sister, who has, or is likely to have, male issue, and not upon her own son.

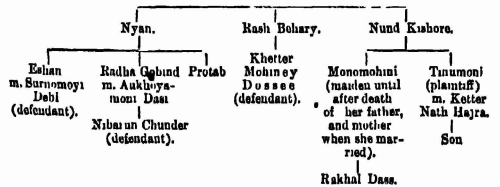
* Full Bench in Special Appeal, No. 1998 of 1880, against the decree of Baboo Brojendro Coomar Seal, Judge of Burdwan, dated the 3rd July 1880, affirming the decree of Baboo Bhuputty Roy, Subordinate Judge of Burdwan, dated the 29th September 1879.

THIS was a suit to recover possession of certain properties which formerly belonged to one Nund Kishore.

The plaintiff alleged, that Nund Kishore left a wife and two daughters him surviving; that, on the death of his wife, her two married daughters, Tinumoni (the plaintiff) and Monomohini, inherited the property, and that, on the death of Monomohini, Tinumoni (the plaintiff) became sole heiress; but the defendants having taken possession of the properties, she brought this suit to recover possession.

The defendants, who were the heirs of the brothers of Nund Kishore, contended, that Nund Kishore left him surviving his wife, Monomohini, an unmarried daughter, and Tinumoni, who was married and had a son at that time; that, after the death of Nund Kishore's wife, Monomohini married and had a son named Rakhal Das; and that this son took the property to the exclusion of Tinumoni and her son.

The following is the genealogical tree of the family:



The Munsif found that Tinumoni was, and that Monomohini was not, married at the date of the death of their mother; that Monomohini had subsequently married, and had a son Rakhal Dass; and that he took Nund Kishore's property to the exclusion of Tinumoni and her son, and dismissed the plaintiff's suit with costs.

The plaintiff appealed to the District Judge, who, on the authority of the case of *Radha Kishen Manjhee* v. *Rajah Ram Mundul* (1) dismissed the appeal and affirmed the decree of the Munsif.

The plaintiff appealed to the High Court. The Judges, PRINSEP and MOHENDRO NATH BOSE, JJ., referred to a Full

(1) 6 W. R., 147.

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Bench the question, whether, according to the Hindu law current in Bengal, on the death of a daughter who had succeeded to her father's estate in her maidenhood (but who, subsequently to her parent's death, had married and had a son), to the exclusion of her married sister, the estate so inherited passes to her son or to her married sister capable of inheriting according to that law?

The reference to the Full Bench was as follows :—

This case raises a question on Hindu law as current in Bengal. The plaintiff is the married daughter of Nund Kishore, the deceased proprietor, and she seeks to take the inheritance left by him on the death of his maiden daughter, who had succeeded to it. She is opposed by the defendants, on the ground that the maiden daughter has left a son who has preference to the succession.

The lower Appellate Court has, on the authority of the case of *Radha Kishen Manjhee* v. *Rajah Ram Mundul* (1) dismissed the plaintiff's claim.

In second appeal it is contended that the judgment in that case is not in accordance with the Hindu law; that although Macnaghten and Elberling in their Treatises have stated that, on the death of one who has inherited as a maiden daughter, her son succeeds to her father's estate before a married daughter, their opinion is not supported by any text of Hindu law; and the ruling of the Sadr Court in the case of *Mussamut Bijia Debia* v. *Mussamut Unnopoorna Debia* (2), on which it is based, does not bear it out.

We have considerable doubts as to the correctness of the judgment of the Division Bench. Referring to v. 30, s. 2, chap. xi of the Dayabhaga, it is clear that the maiden daughter takes the inheritance like any other female heiress, and, on her death, it goes to the heirs of her father, and not her own. Now these heirs, after the widow, are the daughters, and then the daughters' sons. Verse 25 establishes the position that the daughter's son succeeds after the daughter. These texts, taken together, would exclude the maiden daughter's son in the presence of the married daughter of the deceased proprietor.

(1) 6 W. R., 147. (2) 3 Sel. Rep., 26.

The interpolation "without leaving issue" in v. 30 by Srikishen Tarkalankar does not, in our opinion, raise any valid argument in favor of the inheritance of the maiden daughter's son. That was inserted, as we take it, simply to explain the text; for otherwise the husband could not be entitled to succeed to the wife's *peculium*. The verse first establishes the position that, after the maiden daughter, the inheritance devolves on the married daughter and others who would regularly succeed if there were no such unmarried daughter. It then distinguishes the character of the property taken by such daughter from a woman's peculiar property, by saying that the husband cannot take such property, as in the case of a woman's *peculium* when she dies without issue, and concludes by saying that the position of such a daughter is no better than that of the widow, and, as in the case of the latter, so in the case of the former, the heirs of the former owner inherit the property on her death.

That this was the meaning of Srikishen in inserting the above passage will appear from his own treatise called the Dayakrama Sangraha. In chap. 1, s. 3, v. 3, he has put the matter of the 30th verse of the Dayabhaga in his own language as follows, namely:—"The following special rule must be here observed, namely, that if a maiden daughter, in whom the succession had once vested, and who was subsequently married, should die without having borne issue, the married sister who has, and the sister who is likely to have, male issue, inherit together the estate which had so vested in her. It does not become the property of her husband or others, for their right is exclusively to a woman's separate property."

That Srikishen, by making the insertion, never meant to place the maiden daughter's son in a superior position to married daughters, will clearly appear from chap. 1, s. 4, v. 1 of his own book, wherein he places the daughter's son after all the daughters. He says, "in default of all daughters, the daughter's son takes the inheritance," so that, as long as any daughter who is entitled to succeed remains, the daughter's son cannot come in. Nor can such preference, if given, be con-

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sistent with the principle of offering oblations, which is the regulating principle of succession in the Dayabhaga.

There is no reason why, according to that principle, the maiden daughter's sons should have preference over other daughter's sons in regard to the succession, when they equally offer the general cake to their deceased grandfather.

As the point is of great importance, we think it proper to refer the following question for the decision of the Full Bench, namely, whether, according to the Hindu law as current in Bengal, on the death of a daughter who had succeeded to her father's estate in her maidenhood, to the exclusion of her married sister, the estate so inherited passes to her son, or to her married sister capable of inheriting according to that law?

Baboo *Mohiny Mohun Roy* and Baboo *Rashbehary Ghose* for the appellant contended that the case of *Radha Kishen Manjhee* v. *Rajah Ram Mundul* (1), relied on by the lower Appellate Court, was not in accordance with Hindu law; that although Macnaghten and Elberling in their treatises have stated that, on the death of one who has inherited as a maiden daughter, her son succeeds to her father's estate before a married daughter, their opinion is not supported by any text of Hindu law: and the ruling of the Sadr Court in *Mussamut Bijia Debia* v. *Mussamut Unnopoorna Debia* (2), on which it is based, does not bear it out. The Dayabhaga, chap. xi, s. 2, v. 5 clearly states that the maiden daughter takes the inheritance like any other female, and on her death it goes to the heirs of her father, and not to her own heirs; and the heirs, after the widow, are the daughters, and then the daughters' sons. See v. 25, s. 2, chap. xi, Dayabhaga, explained by Srikishen in chap. 1, s. 3, v. 3 of his Dayakrama Sangraha.

The Court here called on the respondents.

Baboo *Sreenath Dass* for the respondents.—The question must be decided by the Dayabhaga, chap. xi. Section 2, v. 30 lays down that, if a maiden daughter, in whom the succession has vested, and who has afterwards married, dies, the estate which was hers becomes the property of the married daughters, who would have succeeded if there had been no unmarried daughter

(1) 6 W. R., 147. (2) 3 Sel. Rep., 26.

to succeed. But this only is the case, I contend, when the unmarried, who afterwards married, dies without issue, and this is shown by the interpolation of the words in v. 30, "without bearing issue," by Srikishen Tarkalankar. [MITTER, J.—The words "without issue" may be struck out as they do not appear in the original, and have been only interpolated by Srikishen. There are two reasons laid down why an unmarried daughter should succeed, whereas there is only one given for a married daughter.] Those are reasons for the succession, but not reasons for preference of one daughter over the other. In the chapters on daughters and daughters' sons Srikishen's own book points out what is meant by the words "after being married." Macnaghten's Hindu Law of Inheritance, p. 24, lays down that if one of several daughters who had, as maidens, succeeded to their father's property, die leaving sons and sisters or sister's sons, then, according to the law in Bengal, the sons take alone the share to which their mother was entitled, to the exclusion of the sisters and sisters' sons; and Elberling on Inheritance, Gift, &c., p. 76, is to the same effect. Section 30 of the Dayabhaga refers only to the case of a maiden daughter dying without leaving a son, and therefore the judgment of the lower Court is correct.

The opinion of the Full Bench was as follows:—

We are of opinion that, on the death of a daughter, who had succeeded before her marriage to her father's estate to the exclusion of her married sister, the estate so inherited by her devolves upon her married sister, who has, or is likely to have, male issue, and not upon her own son.

According to the Hindu law in Bengal, the succession of females who have generally no heritable rights, takes place in certain exceptional cases specified in the Shasters. Jimutavahana, after citing the text of Baudhayana to the effect that "a woman is entitled not to the heritage; for females and persons deficient in an organ of sense or member are deemed incompetent to inherit," says, that "the succession of the widow and certain others takes effect under express texts without any contradiction to this maxim"—See Dayabhaga, chap. xi, s. 6, para. 11.

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There are also certain special rules applicable to the succession of a female. For example, on her death the succession devolves not upon her heirs, but upon the heirs of the last owner who had absolute estate in the property.

Of the exceptional female heirs, the widow ranks first. Jimutavahana, after laying it down that the widow is entitled to succeed on default of a son, grandson, or great-grandson, says in chap. xi, s. 1, para. 56: "But the wife must only enjoy her husband's estate after his demise. She is not entitled to make a gift, mortgage, or sale of it." Thus Katyayana says: "Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her, let the heirs take it." In commenting upon this passage, Jimutavahana says: "But when she (the widow) dies, the daughters or others who would regularly be heirs in default of the wife, take the estate."

Then in para. 65, s. 1, chap. xi, Dayabhaga, its author says: "In like manner if the succession have devolved on a daughter, those persons who would have been heirs of her father's property in her default take the succession on her death, not the heirs of her daughter's property."

Then the above rule is laid down in chap. xi, s. 2, paras. 30 and 31, as applicable to all cases of woman's succession. Referring to the text of Katyayana (chap. ii, s. 1, para. 56), Jimutavahana says in s. 30 cited above: "Since it has been shown by a text before cited that, on the decease of the widow in whom the succession had vested, the legal heirs of the former owner who would regularly inherit the property if there were no widow in whom the succession vested, *viz.*, the daughters and the rest succeed to the wealth; therefore the same rule is inferred *à fortiori* in the case of the daughter and grandson whose pretensions are inferior to the wife's (31), or the word 'wife' is employed with a general import; and it implies that the rule must be understood as applicable generally to the case of a woman's succession by inheritance."

There is no authority to be found in any portion of the Dayabhaga or any other Hindu law-book recognized in Bengal,

which shows that this rule, which is so clearly laid down as applicable to all cases of woman's succession by inheritance, does not apply to the case of a maiden daughter's succession.

It is said that, in the opinion of Srikishen Tarkalankar (a commentator of the Dayabhaga, and also the author of a treatise on inheritance current in Bengal, *viz.*, Dayakrama Sangraha), this rule is not applicable to the case of a maiden daughter succeeding to the property of her father, and then dying after marriage, leaving a son. But neither in his commentary, nor in his treatise, is to be found any passage clearly expressing this opinion. On the other hand, in the Dayakrama Sangraha, he says in chap. 1, s. 4, which treats of the right of succession of the daughter's son, that "in default of all daughters, the daughter's son takes the inheritance," &c., &c.

There is, therefore, no express authority in Srikishen's Dayakrama Sangraha, or in his commentary on the Dayabhaga, for the contention that the general rule applicable to the succession of a woman is not applicable to the case of a succession of a maiden daughter dying after marriage and leaving a son. But it has been contended, that this is the opinion of Srikishen, may be inferred, because in para. 30, chap. xi, s. 2 of the Dayabhaga, he suggests that, after the word 'die,' the words "without bearing issue" are understood. He does not assign any reason for this suggestion. We are left entirely to conjecture only, as to the ground for his holding that these words are understood. The passage with the words suggested by Srikishen placed within brackets runs thus: "But if a maiden daughter in whom the succession has vested, and who has been afterwards married (die without bearing issue), the estate which was hers, becomes the property of those persons, a married daughter or others, who would regularly succeed if there were no such (unmarried daughter) in whom the inheritance vested, and in like manner succeed on her demise after it has so vested in her. It does not become the property of her husband or other heirs; for that text (which is declaratory of the right of the husband and the rest) is relative to a woman's peculiar property."

It is clear that, this is an illustration of the general rule laid

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down in the latter end of this and in the next paragraph, *viz.*, that, in the case of woman's succession, the property on her death devolves not upon her heirs, but upon the heirs of the last owner. It is exceedingly probable that the annotator suggested the addition of the words "without leaving issue," thinking that the language of the author without these words would be open to the objection of want of precision. Because, on the death of a maiden daughter (in whom the succession had vested, and who had been afterwards married) leaving issue, the estate would "not become the property of her husband or other heirs," even if the law regulating the succession to a woman's peculiar property were applicable, because the husband would succeed only in default of issue.

In our opinion, therefore, Srikishen Tarkalankar suggested the addition of these words by way of mere verbal criticism upon the language of the paragraph (30) cited above, and that he did not intend thereby to lay down an exception to the general rule enunciated by Jimutavahana relating to the case of a woman's succession by inheritance.

In Macnaghten's Hindu Law, Vol. I, page 25, and Elberling on Inheritance, it is laid down that, in a case like the present, the son of the deceased sister is entitled to succeed to the exclusion of the married sister. No authority is cited in support of this doctrine, which is clearly contrary to the opinion of Jimutavahana. Futhermore, Mr. Macnaghten was mistaken in supposing that the case of *Mussamut Bijia Debia* v. *Mussamut Unnopoorna Debia* (1) was decided in accordance with the doctrine laid down by him. That case does not in any way support his view.

The case of *Radha Kishen Manjhee* v. *Rajah Ram Mundul* (2), referred to in the order of reference, seems to have been mainly decided on the authority of Macnaghten and Elberling. But the opinion of these two European text-writers on Hindu law being opposed to the Dayabhaga cannot be followed. The learned Judges who decided that case also referred to the Dayabhaga, chap. xi, s. 2, para. 30, as supporting their view. But in our opinion the text cited shows just the contrary.

(1) 3 Sel Rep, 26. (2) 6 W R, 147

The decisions of the lower Courts are, therefore, erroneous. We accordingly reverse them. The case will be remanded for the trial of the other questions raised by the parties. Costs will abide the result.

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Appeal allowed—Case remanded.

APPELLATE CIVIL.

Before Mr. Justice Mitter, Officiating Chief Justice, and Mr. Justice Norris.

BESSESSUR BHUGUT AND OTHERS (DEFENDANTS) *v.* MURLI SAHU AND OTHERS (PLAINTIFFS).*

1882 *July* 22.

Civil Procedure Codes (Act VIII of 1859), *s.* 246; *and (Act X of* 1877), *ss.* 97-371—*Limitation Act (XV of* 1877), *sched. ii, arts.* 11 *and* 120.

The defendants attached certain property, which the plaintiffs alleged belonged to them. The plaintiffs preferred a claim to the property under s. 246 of Act VIII of 1859: this claim was disallowed on the 15th August 1877.

In June 1878, the plaintiffs brought a suit to establish their title to the property attached, and for confirmation of possession. Pending this suit, the principal defendant died, and the plaintiffs applied for an order to substitute certain persons as defendants. The Court thereupon directed the issue of a summons on the defendants proposed by the plaintiffs to appear and defend the suit; but the plaintiffs failing to pay the costs of the service of this summons, the suit was dismissed on the 14th March 1879.

On the 4th March 1880, the plaintiffs again brought a suit to establish their title to the same property, and for confirmation of possession.

Held, that the order of the 15th August 1877 not being an order passed under s. 283 of Act X of 1877, art. 11 of sched. ii of Act XV of 1877 did not apply, but that art. 120 of sched. ii was applicable; and that as the first suit had not been dismissed upon the merits, the plaintiffs were entitled to maintain the second suit.

Baboo *Umakali Mookerjee* for the appellants.

Baboo *Taruck Nath Paulit* for the respondents.

* Appeal from Appellate Order, No. 27 of 1882, against the order of H. W. Gordon, Esq., Officiating Judge of Mozufferpore, dated the 4th January 1882, reversing the decree of Baboo Koylash Chunder Mookerjee, Second Subordinate Judge of that district, dated the 25th August 1882.

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THE facts of this case are sufficiently set out in the judgment of the Court (MITTER, Offg. C.J., and NORRIS, J.), which was delivered by

MITTER, Offg. C.J. — It appears that the appellants before us held a decree against certain persons, who are on the record styled the second party defendants, and in execution of that decree the property in dispute in this case was attached. The plaintiffs intervened under s. 246 of the Procedure Code of 1859, claiming to have the property in dispute released on the ground that it did not belong to the second party defendants, but to themselves. Their claim was disallowed by the Court executing the decree on the 15th of August 1877.

The present suit was brought on the 4th of March 1880 for the purpose of establishing the plaintiffs' title to the property in dispute, and for confirmation of their possession thereof. The object of the suit apparently was to obtain a declaration that the decree-holders were not entitled to sell this property in execution of their decree against the second party defendants.

The Court of first instance dismissed the plaintiffs' suit as barred by limitation. It was of opinion that art. 11 of the 2nd schedule of the present Limitation Act applied to this suit, and that as it was not brought within one year from the 15th of August 1877, when the Execution Court disallowed the plaintiffs' claim under s. 246, it was barred.

There was also another question before that Court, and it arose in this way.

Before the present suit was brought, the plaintiffs had brought another suit for obtaining the same declaration, and while that suit was pending, the principal defendant,—namely, the father of the appellants before us,—died. Thereupon, the plaintiffs applied for the substitution of the appellants in the place of their deceased father. The Court granted their application, and directed that a summons should issue to the appellants before us to appear on a day fixed by the Court to defend the suit; but the plaintiffs having failed to pay the costs required for the service of this summons the suit was dismissed.

With reference to this proceeding, the appellants contended before the Court of first instance that the dismissal of the suit

under such circumstances operated as a bar to the maintenance of the present suit.

On this point also the decision of the first Court was in favour of the appellants before us.

On appeal, the District Judge overruled both the pleas raised in the defence. He was of opinion that as the order of the 15th of August 1877 was not an order passed under s. 283 of Act X of 1877, art. 11 of sched. ii of the Limitation Act did not apply.

As regards the other objection, the Judge held that the suit was not dismissed under the provisions of s. 371 of Act X of 1877, but was dismissed under the provisions of s. 97 of that Act; and as an order passed under s. 97 is no bar to a fresh suit, the District Judge was of opinion that the plaintiffs were entitled to maintain this suit.

Against this judgment the present appeal has been preferred.

We agree with the District Judge in the opinion expressed by him on both these points. The Limitation Act must be strictly construed. In this case there is no doubt that Act XV of 1877 would apply, because the present suit was brought more than two years after the passing of that Act. But then it must be shown that art. 11, which the Court of first instance held barred the present suit, is really applicable. That article distinctly refers to an order passed under s. 283 of Act X of 1877, and as the order of the 15th of August 1877 was not an order passed under that section, the article in question cannot apply: and if art. 11 is not applicable, then art. 120, which gives six years as the period of limitation for all the other kinds of suits not elsewhere provided for in the Act, will apply; and if art. 120 applies then the suit is in time.

But it has been argued that if the order of the 15th of August 1877 is not to be considered as an order passed under s. 283 of Act X of 1877, then the plaintiffs are not entitled to maintain this suit at all, because s. 246, which gives to an unsuccessful party in a proceeding under it the right of instituting a suit to establish his title, was repealed by s. 3 of Act X of 1877, and there is no provision in that Act, nor in s. 6 of Act I of 1868, saving the existing rights of the parties.

Without expressing any opinion upon the question whether

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the repeal of an Act affects existing rights (and, as at present advised, I am disposed to think that, independently of s. 6 of Act I of 1868, the repealing of an Act would not affect rights already acquired), it seems to us that the contention of the learned pleader for the appellants is not valid.

If s. 246 of Act VIII of 1859 is to be considered as wholly repealed, then the learned pleader must establish that the present suit is barred by any of the provisions of Act X of 1877. The present suit is a suit of a civil nature, and s. 11 of Act X of 1877 says, that the Courts shall, subject to the provisions contained in that Act, have jurisdiction to try all suits of a civil nature excepting suits the cognizance of which is barred by any enactment for the time being in force. The learned pleader must, therefore, make out that the cognizance of this suit is barred by any enactment now in force; but he has not been able to do so. We are, therefore, of opinion that there is no force in this contention.

Then, as to the question whether the order of dismissal passed in the former suit would not operate as a bar to the present suit, we entirely agree in the view which the District Judge has taken of that order.

Section 371 of Act X of 1877 cannot apply. That section applies only to orders passed under the last paragraph of s. 368, and the second paragraph of s. 370. Under the last paragraph of s. 368 a suit abates, and under the last paragraph of s. 370 an order of dismissal may be passed when the circumstances mentioned in that section come into existence.

The order referred to, therefore, not having been passed under s. 371, the only other section under which it could have been passed is s. 97.

But supposing that s. 97 were not applicable if the order was not passed under s. 371, the cognizance of the present suit is not barred, because the order dismissing the suit was not an order disposing of it on the merits.

On all these grounds, we are of opinion that the decision of the lower Appellate Court is correct.

We dismiss the appeal with costs.

Appeal dismissed.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Mitter, and Mr. Justice Maclean.

HARI RAM AND ANOTHER (DEFENDANTS) v. DENAPUT SINGH AND ANOTHER (PLAINTIFFS).*

1882 *July* 13.

Unpaid Vendor—Lien—Creditor of Vendor, Right of, to Lien—Mortgage.

Although an unpaid vendor holds a lien upon property sold for the consideration-money, yet a creditor of that vendor cannot claim the same right.

THE facts of this case were, that the plaintiffs, under a chitti dated March 1873, lent to Ram Nath and Hem Nath a sum of Rs. 192, and that Hem Nath and Ram Nath being possessed of a share in a certain mauza, the former sold his share to one Gokoola Persad, defendant No. 2, on the 10th July 1874, and on the same date, Hem Nath, as guardian of his deceased brother's child, granted a zurpeshgi lease of Ram Nath's share to Gokoola Persad, defendant No. 2. Out of the consideration-money of these two transactions by an arrangement between the parties, Rs. 192 was left in the hands of defendant No. 2, to be paid over to the plaintiffs in satisfaction of their loan of March 1873. Defendant No. 2 neglected to pay over this sum, and the plaintiffs brought a suit for its recovery; and on the 13th September 1876 obtained a decree against defendant No. 2 for the amount due, and in execution of this decree caused the property bought by Gokoola Persad, the defendant No. 2, to be sold, and themselves became the purchasers at the sale on the 2nd April 1877, and were put into possession by the Court.

Defendant No. 2, on the 10th April 1875, had given a mortgage of the properties so purchased in execution by the plaintiffs, to defendant No. 1; and the latter, on the 18th May 1877, brought a suit on his mortgage-bond and obtained thereon a decree. Defendant No. 1 executed his decree by putting up the property to sale, and purchasing it himself on the 6th May 1878. The plaintiffs objected to the sale, alleging that they held

* Appeal from Appellate Decree, No. 131 of 1881, against the decree of Baboo Kali Prosunno Mookerjee, Second Subordinate Judge of Sarun, dated the 13th September 1880, reversing the decree of Baboo Purno Chunder Banerjee, Officiating Munsif of Pursa, dated the 9th July 1879.

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an equitable lien on the properties, as the money for which they had obtained a decree was in reality part of the purchase-money which defendant No. 2 had to pay to Hem Nath and Ram Nath, and that they stood in the place of these two latter; and on their objections being overruled on the 23rd March 1878, brought this present suit on the 22nd March 1879 to have the sale of the 6th May 1878 set aside, and to reverse the execution-proceedings which disallowed their objections, on the ground that their purchase prevailed over the defendants' mortgage, inasmuch as they had a prior lien upon the property.

Defendant No. 1 contended that the decree obtained by the plaintiffs was merely a simple money-decree which could create no lien on the property in suit; that the property having been previously mortgaged by the judgment-debtor to him, the plaintiffs could, by their purchase, which extended merely to the rights and interests of the judgment-debtor, only acquire a right of redemption in the property, and not having redeemed it before it was brought to sale in execution of his decree, their right lapsed.

The Munsif dismissed the plaintiffs' suit, holding that the plaintiffs only purchased the right of redemption, and not having exercised their right before the purchase of defendant No. 1, their right was annihilated.

The plaintiffs appealed to the District Judge, who held, that defendant No. 1 acquired nothing by his purchase, the plaintiffs not having been made parties to the suit of defendant No. 1, and that the plaintiffs' purchase was not therefore affected; and that they being in possession, the order of the 23rd March 1878, made against them when objecting to the sale, was wrong, and for these reasons he reversed the decree of the Munsif and set aside the miscellaneous order of the 23rd March 1878.

The defendant No. 1 appealed to the High Court.

Moonshee *Mahomed Yusuf* for the appellant.—The appellant has a preferential title to the property, his decree being a mortgage decree, the suit was brought upon a mortgage-bond, and the whole claim decreed, it must therefore be taken that not only the claim for money, but also the claim upon the property,

was decreed—*Debi Charan* v. *Pirbhu Din Ram* (1). The suit upon the mortgage-bond was instituted on the 17th January 1877, and the present plaintiff purchased in execution of his money-decree on the 2nd April 1877, therefore the doctrine of *lis pendens* applies.

Baboo *Karuna Sindhu Mookerjee* for the respondents.—The decree obtained by the defendants was in reality a money-decree; the doctrine of *lis pendens* can have no application to the case of an execution-purchaser, but the doctrine would apply to cases of voluntary alienation—*Sreemutty Gourmoney Dabee* v. *Charles Reed* (2), *Dhurendro Chunder Mookerjee* v. *Anund Moyee Dossee* (3), *Nuffur Merdha* v. *Ram Lall Adhicary* (4), and *Ali Shah* v. *Husain Baksh* (5). If a third party purchases at an auction-sale pending suit, he may be made a party by a supplemental bill—Story on Equity Pleading, 342.

The doctrine of *lis pendens* was held to apply in the following cases: *Rajhisken Mookerjee* v. *Radha Madhub Holdar* (6), *Lala Kali Prosad* v. *Buli Singh* (7), *Rabia Khanum* v. *J. P. Wise* (8), and *Manual Fruval* v. *Sanayapalli Latchmidevamma* (9) on the supposition that there was no distinction between voluntary and involuntary alienations; but the Privy Council, in the case of *Donendro Nath Sannyal* v. *Ram Coomar Ghose* (10) have decided that there is a distinction. If the doctrine of *lis pendens* does not apply, then even supposing that the decree which the defendant obtained was a mortgage-decree, still he would get nothing at the sale in execution of his decree. The mortgagee can only sell his lien and the property of the judgment-debtor; and if at the sale the judgment-debtor has no property, the lien cannot pass to the purchaser, because the lien is inseparable from the property—*Metharam Das* v. *Boloram Phukan* (11). The only remedy which the mortgagee has, is to

(1) I. L. R., 3 All., 388.
(2) 2 Taylor and Bell, 83.
(3) 1 W. R., 103.
(4) 15 W. R., 308.
(5) I. L. R., 1 All., 588.
(6) 21 W. R., 349.
(7) I. L. R., 4 Calc., 789; S. C., 3 C. L. R., 396.
(8) 23 W. R., 329.
(9) 7 Mad. H. C., 105.
(10) 10 C. L. R., 281.
(11) 9 C. L. R., 233.

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enforce his lien against the person in possession of the property—*Chowdhry Jonmejoy Mullick* v. *Dassi Moni Dassi* (1).

Moonshee *Mahomed Yusuf* in reply cited *Manual Fruval* v. *Sanagapalli Latchmidevamma* (2).

The judgment of the Court (GARTH, C.J., and MITTER and MACLEAN, JJ.) was delivered by

GARTH, C.J. — The facts of this case are briefly these: Two persons, Ram Nath and Hem Nath, took a loan of Rs. 192 from the plaintiffs, under a chitti dated the 17th Falgoon 1280 (March 1873). Hem Nath sold his share in Mauza Rizapore Damudur to Gokoola Persad, defendant No. 2, on the 24th July 1874. On the same date Hem Nath, as the guardian of his nephew Mothoora Persad, son of his deceased brother, the aforesaid Ram Nath, granted a zurpeshgi lease of Ram Nath's share in the same property also to Gokoola Persad, defendant No. 2. Out of the consideration-money of these two transactions, by an arrangement between the parties, Rs. 192 was left with the defendant No. 2 to be paid over to the plaintiffs in liquidation of the debt due under the chitti of the 17th Falgoon 1280 (March 1873), but this money was not paid by the defendant No. 2 to the plaintiffs, who brought a suit for its recovery; and, on the 13th September 1876, obtained a money-decree against the defendant No. 2.

Before this decree was passed, defendant No. 2, Gokoola Persad, mortgaged the mauza in suit, that is Rizapore Damudur, to the defendants, first party in this suit.

The plaintiffs, in execution of their decree, caused the property in suit to be sold, and purchased it themselves on the 2nd April 1877.

The defendants first party brought a suit against the defendant No. 2 to enforce their mortgage-bond dated the 10th April 1875, and obtained a decree on the 18th May 1877. The plaintiffs' decree was for a very small amount, *viz.*, for Rs. 192, with costs and interest. The decree obtained by the first party defendants was for a very large amount, *viz.*, about a lac of

(1) 9 C. L. R., 353. (2) 7 Mad. H C., 105.

rupees. The defendants first party, in execution of their decree, attached the property in suit. The plaintiffs thereupon intervened, and objected to the sale, on the ground of their prior purchase dated the 2nd April 1877; their case before the execution Court was that, under their decree, they held an equitable lien upon the property in dispute, because the money for which they had obtained a decree was really part of the consideration-money which Gokoola Persad, the vendee, had to pay to Hem Nath and Ram Nath. They contended that as Hem Nath and Ram Nath could claim a lien upon the property sold for that portion of the consideration-money which the vendee Gokoola Persad had not paid, they, standing in the shoes of Hem Nath and Ram Nath, were entitled to claim the same lien.

The Execution Court, however, on the 23rd March 1878, disallowed the claim and directed the property to be sold, unless the plaintiffs should satisfy the mortgage-decree. The value of the property in dispute being only Rs. 751, the plaintiffs, of course, did not pay the amount due upon the defendants' decree, which was for upwards of a lac of rupees, in order to save it; and it was accordingly sold in execution of the defendants' decree and purchased by the defendants on the 6th May 1878.

The plaintiffs then brought this suit on the 22nd March 1879, for the declaration of their title to the mauza in suit, on the ground that their purchase should prevail over the defendants' mortgage, because they had a prior lien upon the property. The Munsif tried this question only,—*viz.*, whether the plaintiffs held a prior lien upon the property or not. This question was raised in the first and the second issues framed by the Munsif. The Munsif was of opinion that the plaintiffs' contention was not valid. The plaintiffs being only creditors of the vendors, in his opinion, could not claim the same lien upon the property sold for any unpaid portion of the purchase-money which the vendors had. He accordingly dismissed the suit.

On appeal, the Subordinate Judge disposed of the case on an issue which was not raised by the parties. He decreed the plaintiffs' claim, because the plaintiffs were not made parties to the defendants' suit upon their mortgage-bond. The Subordinate Judge was not right in disposing of the suit by allowing

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the plaintiffs' to alter the nature of their contention in the Appellate Court. The plaintiffs, it seems to us, purposely did not put their case on the ground upon which the Subordinate Judge has decided it, because it would have enabled them only to obtain a temporary victory. If the defendants were to bring a suit against them to enforce their lien, the property in dispute could not be saved unless they would pay the whole of the mortgage-decree, which evidently they would not do because it is of small value compared with the amount of the mortgage-debt. The plaintiffs, therefore, put their case upon the only ground upon which, if they succeeded, they thought they would be able to reap a real benefit—that is, if they could establish their prior lien, they would be entitled to hold the property in dispute free from the defendants' mortgage. The Subordinate Judge was, therefore, not right in allowing the plaintiffs to make out a new case in the Appellate Court.

Then, as regards the Munsif's decision, we are of opinion that it is correct in law. It is true that an unpaid vendor holds a lien upon the property sold for the consideration-money, but a creditor of that vendor cannot claim the same right. The decree of the lower Appellate Court will be reversed with costs, and the decree of the Munsif will be restored with costs.

Appeal allowed.

Before Mr. Justice Tottenham and Mr. Justice Bose.

1882 *June* 22.

GOBIND LALL SEAL AND ANOTHER (DEFENDANTS) *v.* CHANDHURRY MAITY AND OTHERS (PLAINTIFFS).*

Sale for Arrears of Rent—Publication of Notice of Sale—Material Irregularity—Reg. VIII of 1819, *s.* 8, *cl.* 2.

Clause 2, s. 8 of Reg. VIII of 1819, which provides that a notice of sale under the Regulation shall be stuck up in the cutchery of the zemindar, is not complied with by serving the notice upon the zemindar himself or his agent. The object of the Regulation is to make known to the holders of under-tenures and ryots and the residents of the place that the patni will be sold if

* Appeal from Original Decree, No. 170 of 1881, against the decree of Baboo Jodu Nath Roy, Subordinate Judge of Midnapore, dated the 31st May 1881.

the arrears are not paid off within the time specified, and if the notice is not stuck up in the cutchery, as prescribed by the Regulation, there is such a material irregularity in the publication as will avoid the sale.

Baboo *Aushootosh Dhur*, Baboo *Rojender Nath Bose*, and Baboo *Gopal Chunder Ghose* for the appellants.

Baboo *Gopi Nath Mookerjee* for the respondents.

THE facts of this case sufficiently appear from the judgment of the Court (TOTTENHAM and BOSE, JJ.), which was delivered by

TOTTENHAM, J.—This is an appeal against the decree of the Subordinate Judge of Midnapore, setting aside a patni-sale on the ground of certain irregularities, which the Court below considered to have been established, and which it thought had been the cause of the patni being sold for an inadequate price.

As to the irregularities found by the lower Court, we think that there is only one with which we need deal. As to the others we doubt whether they should be held to be irregularities at all; and even if they are, we do not think that the plaintiffs, the patnidars, can be said to have sustained any injury therefrom. The material irregularity, however, upon which the lower Court's decree must stand or fall is that relating to the service of the notice under s. 8 of the Patni Regulation. The Regulation requires that there shall be a threefold publication of the notice: A notice is to be published in the Collector's office; a similar notice is to be stuck up at the sadr cutchery of the zemindari; and a copy or extract of such part of the notice as may apply to the individual case shall be sent by the zemindar to be similarly published at the cutchery or at the principal town or village upon the land of the defaulter. The Regulation further provides that the notice to be sent to the mufassal shall be served by a single peon, who shall bring back the receipt of the defaulter or his manager for the same, or, in the event of inability to procure this, the signatures of three substantial persons residing in the neighbourhood, in attestation of the notice having been brought and published on the spot.

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The dispute in the case relates to the notice which the law requires to be published on the spot,—that is, at the defaulter's cutchery.

The Court below has found it to be false that the notice was, as alleged, stuck up on the door of the cutchery.

The evidence shows that the service was accomplished by making the notice over to the karkoon of the defaulter in the absence of the defaulter himself and his naib. The karkoon admits having received it and having given a receipt for it. He also proves that, on the return of the naib, he made the notice over to him.

We have no doubt, therefore, upon the evidence, that the defaulter, or his manager, had notice of the intended sale of the patni for arrears; but the Court below holds that such service was not sufficient; and that, when the Regulation lays down that the notice shall be stuck up at the cutchery of the defaulter, or in some principal town or village upon his land, it is not sufficient to hand it over to one of his servants and take his receipt, that servant not being the manager of the defaulter.

Baboo Aushootosh Dhur, who appears for the appellants, admits that if the Regulation intended the local publication of the notice to be for the information of ryots and holders of under-tenures in the patni, then mere service of the notice on the defaulter's servant would be insufficient; but he contends that the Regulation does not contemplate any such publication as should inform the local public,—that is, the publication of the notice in the mofassal. He says, that the only information intended for the public is that to be gained from the notice suspended in the Collector's office and the zemindar's cutchery. He contends that the notice prescribed for the defaulter's cutchery is simply intended to convey information to the defaulter or his manager that the patni is in jeopardy.

We do not take the same view of the law. If the notice were only intended to convey private intimation to the defaulter or his agent, the law would hardly have used the term 'published.' To publish is, in our opinion, to make public,—that is, to convey information to the public or all whom it may concern.

There is one point which merits observation, although it has

not been brought to our notice by the pleaders on either side; and it is this—that, in the notice issued by the zemindar to the defaulter, it is set out specifically that "it is the duty of the peon, who is entrusted with this notice, to proceed first of all to the principal mauza or cutchery of the aforesaid lot, stick up the same and bring back the receipt, according to the form of the publication of this notice, from the taluqdar himself or from his naib, or any other agent." It is quite clear, therefore, that the zemindar himself, or at any rate the person who prepared this notice for him, fully understood that the Regulation requires what we now hold to be its requirements. Baboo Aushootosh Dhur has referred us to the case of *Hunooman Dass* v *Bipro Churn Roy* (1), in which a Division Bench of this Court held, that when it was shown that the defaulter's cutchery was an empty and ruinous building, and the notice had therefore been served upon the gomashta's residence, where the business of the patnidar was actually carried on, such service was an infinitely more exact compliance with the spirit of the law, than service of the notice at the deserted cutchery would have been. The Judges in that case said that the object of the Regulation in this particular was to ensure the publication of the notice to the defaulter or his manager. The pleader, therefore, asks us to infer that the Regulation does not intend any such notice to any body else, and that personal service upon a servant is equal, not to say superior, to the mode of service prescribed in the Regulation,—that is, the sticking up of the notice on the cutchery. We need hardly say that we fully concur in the judgment pointed out to us so far as it goes. We fully agree that where the gomashta's house has practically taken the place of an old and dilapidated cutchery, publication at that house sufficiently meets the requirements of the Regulation. We also agree that the object of the Regulation in this particular is to ensure the publication of the notice to the defaulter or his agent. But we do not find that the Judges in that case said that this was the exclusive object. Had they said so, we should have felt compelled to disagree with them. In our opinion the object of the Regulation is also to make known to the holder of under-

(1) 20 W R, 132

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tenures and ryots and the residents of the place generally that the patni will be sold if the arrears are not paid off within the time specified; and in the case cited we find that the notice was not merely served personally on the gomashta, and shut up by him in his box, but was, as prescribed by the Regulation, stuck up on the house. There is, therefore, nothing in that case which to our minds relaxes the rules laid down in s. 8 of the Regulation.

As observed before, Baboo Aushootosh Dhur has admitted that should we take the view we have just expressed of the object of the Regulation his case must fail. We have thus arrived at the result which he foreshadowed.

The appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Tottenham and Mr. Justice Bose.

1882 *July* 3.

LUCHMIPUT SINGH (ONE OF THE DEFENDANTS) *v.* AMIR ALUM (PLAINTIFF) AND OTHERS (DEFENDANTS).

Mahomedan Law—Wuqf—Provisions for Payment of Debts and Maintenance—Minor Plaintiff—Guardian.

A Mahomedan created a *wuqf* of all his property, and appointed his minor grandson mutwali, providing that, during the minority, the property should be managed by the minor's father. The deed contained a provision that, in the first place, certain debts should be paid, and then provided that the property should be applied towards the religious uses created and the maintenance of the settlor's grandsons and their male issue. In execution of a decree against the minor's father, the endowed property was attached and sold. In a suit by the minor through his sister, as guardian, to recover possession of the property, in which suit the sister was not made guardian *ad litem* by an order of Court, but was allowed to sue by the District Judge,

Held, that the suit was maintainable as framed.

Held also, that, notwithstanding the provisions for payment of debts and maintenance, the *wuqf* was valid.

BY a *wuqfnama*, dated the 6th February 1872, one Shah Enayet Hossein endowed certain properties, which he had inherited from his wife Bibi Rujjan, for the expenses of the

Appeal from Original Decree, No. 175 of 1880, against the decree of Moulvi Hufez Abdul Karim, Subordinate Judge of Bhagalpore, dated the 16th of April 1880.

musjid and the tomb of the holy personages of his family, the servants of a certain *asthana*, and for performing the *urs* and *fateha* at the tomb; and he appointed Shah Mahomed Amir Alum, his grandson, the minor son of Syed Shah Asudulla, as mutwali. The deed directed that so long as Shah Mahomed Amir Alum remained a minor, Syed Shah Asudulla should manage the property, and it directed that the manager should, in the first place, pay certain debts, and afterwards apply the property towards the religious uses created and the maintenance of the settlor's grandsons and their male issue. Besides the endowed property, Syed Shah Asudulla was possessed of property which he had acquired by inheritance.

In execution of a decree obtained by Brij Mohun Thakur and Huri Mohun Thakur, against Shah Asudulla, the endowed property was sold on the 7th August 1878 and purchased by Roy Luchmiput Singh.

Shah Amir Alum, who was still a minor, now instituted a suit through Mussamut Bibi Ommutul Fatema, his sister, against Roy Luchmiput Singh, Brij Mohun Thakur, Huri Mohun Thakur, and Shah Asudulla, for a declaration that the endowed property was not liable to be sold for the debts of Shah Asudulla, and for possession. Mussamut Bibi Ommutul Fatema was not appointed guardian *ad litem* by an order of Court, but was allowed to sue by the District Judge. The defendants, besides the usual pleas of fraud and collusion, pleaded that the plaintiff could not sue through Ommutul Fatema, and that the deed was invalidated by the condition for payment of debts.

The Subordinate Judge held, that it was reasonable and proper that Mussamut Ommutul Fatema should be the guardian for the purposes of the suit, and that the endowment was valid.

The defendant Roy Luchmiput Singh appealed to the High Court.

Baboo *Sreenath Dass* and Baboo *Rashbehary Ghose* for the appellant.

Mr. *R. E. Twidale*, Mr. *C. Gregory*, and Moonshee *Mahomed Yusuf* for the respondents.

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LUCHMIPUT SINGH v. AMIR ALUM.

The judgment of the Court (TOTTENHAM and BOSE, JJ.) was delivered by

TOTTENHAM, J.—This is an appeal against a decree of the Subordinate Judge of Bhagalpore, ordering restoration to the plaintiff, respondent, as mutwali, of certain property alleged to be *wuqf*, which had been acquired by the defendant No. 1, appellant, by auction-purchase in execution of a decree held by the defendants Nos. 2 and 3 against the defendant No. 4. The *wuqf* was created in 1872 by Shah Enayet Hossein, the late father of the defendant No. 4, and grandfather of the plaintiff. The plaintiff, being a minor, the suit was, with the permission of the District Judge, instituted on his behalf by his sister, Bibi Ommutul Fatema, *alias* Bibi Nur Jehan.

The defendant No. 4, Shah Asudulla Saheb, is the plaintiff's father.

When the property was attached in 1873, the debtor filed a claim on behalf of the present plaintiff, objecting that the property was *wuqf*, and not liable to be sold, the debtor being only the manager thereof during the minority of his son, the mutwali. That claim, however, was rejected, and the sale took place on the 7th of August 1878.

The judgment of the lower Court, after setting out the pleadings, held, that the suit was maintainable as brought; that the *wuqf* was a valid one in all respects; and that the purchaser at auction had acquired no right under the sale.

The contentions urged before us in appeal have been, *first*, that the suit was not maintainable by Ommutul Fatema as next friend to the minor plaintiff, and that there must be a formal order of the Court appointing a guardian *ad litem*; *secondly*, that the alleged *wuqf* is not a valid one under Mahomedan law; and *thirdly*, that the *wuqfnama* was never intended by Enayet Hossein, the maker of it, to be operative, and that, in fact, the property has always continued to be enjoyed and used as the means of support of the family.

As to the first point we think that the objection is not well founded. It was first assumed by the pleader for the appellant that the minor's father, the defendant No. 4, was his certificated guardian under Act XL of 1858. But it seems that this is not

so; and we consider that the District Judge, who undoubtedly had jurisdiction to try this suit, was competent, under s. 3 of the Act, to allow it to be instituted by the minor's sister, he considering that the father had neglected his interests in respect of the property in suit.

The next question is, whether or not the *wuqf* is a valid one according to Mahomedan law. There has always been a good deal of controversy in the Courts as to what is essential, and as to what will invalidate a *wuqf*. On the one hand it has been contended that no *wuqf* is valid unless it is solely and wholly for pious and charitable purposes enduring throughout all times; and on the other hand, there have been those who considered that what is practically a perpetual provision for the dedicator's family may be a valid *wuqf*.

The fact that the Subordinate Judge who tried this case is himself a Mahomedan gentleman of considerable attainments in Arabic learning, entitles his opinion to peculiar weight in a case of this nature; and he appears to have entertained no doubt, whatever, as to this *wuqf* being of a thoroughly legitimate character as to its constitution and objects. And singularly enough, the only matter which strikes us as one in respect of which, with reference to the decisions of the Courts, makes the character of this alleged *wuqf* at all doubtful, is the very one which the lower Court has treated as one as to which there could be no dispute as to its being a proper object of *wuqf*. For, in the *wuqfnama*, there is express provision for the maintenance of the dedicator's male descendants, in addition to the strictly pious and religious objects for which the *wuqf* purports to have been made. But the Bombay High Court has, by a Full Bench, decided that, to constitute a valid *wuqf*, there must be a dedication of the property solely to the worship of God, or to religious or charitable purposes; see *Abdul Ganne Kasam* v. *Hussen Miya Rahimtula* (1). That view has been endorsed by a Division Bench of this Court in the case of *Mahomed Hamidulla Khan* v. *Budrunnissa Khatun* (2).

This definition might seem to exclude from judicial recognition a *wuqf* of which one object is a provision for the family of the creator of it.

(1) 10 Bom. H. C. R., 13. (2) 8 C. L. R., 164.

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The lower Court, however, easily disposes of this question by the observation that "it is quite evident, and there is no necessity to quote any authority on the subject, that a *wuqf* for one's-self and for one's children is valid."

In the Bombay case the Judges, after considering all the available authorities on this question, held, that the balance was in favor of the dictum to which they gave effect; and this too was what the Division Bench, of which one of us was a member, decided in the case of *Mahomed Hamidulla Khan* v. *Budrunnissa Khatun* (1). In that case the alleged *wuqf*, which we declined to recognize, had for its object nothing connected with the worship of God or religious observances, and provided only in a very remote contingency for the poor. It was simply a perpetuity for the benefit of the dedicator's daughter and her descendants so long as any should exist.

The *wuqfnama* now before us is of a very different character; and having regard to the passage in it reciting the fact of dedication, we think that, without saying whether or no we are prepared on further consideration to adopt to the full the ruling above-mentioned, we can treat this *wuqf* as actually fulfilling the condition described, for the maker of the *wuqf*, after reciting the whole of his property of every kind, proceeds to declare that all has been endowed by him for the expenses of the mu-jid and the tombs of the holy personages of his family, the servants of the *asthana*, and for performing the *urs* and *fateha* at the tomb.

These are the objects of the *wuqf*, and they are all distinctly religious. They also involve to some extent charity to the poor.

We are disposed to hold this, therefore, to be a valid *wuqf* within the purview of the rulings quoted.

The subsequent direction that the manager shall maintain the future male descendants of the maker of the *wuqf* does not necessarily alter its character. Whether or not the provision or direction can be lawfully carried out, it is not necessary for us now to decide. But apart from this we are of opinion that the *wuqf* was completed by the passage which we have quoted. And we accordingly decide this point against the appellant.

(1) 8 C. L. R., 164.

As regards the third and last objections we are of opinion that the *wuqf* being found to be a legal and valid one, it is really immaterial for the purposes of this suit to enquire how the proceeds of the property have since been applied. For no amount of misappropriation or other misconduct on the part of the manager can alter the character of the *wuqf* or render it void.

That being so, we hold that the decree of the lower Court was right, and we dismiss the appeal with costs.

This judgment will also govern Appeal No. 52 of 1881.

Appeal dismissed.

Before Mr. Justice White and Mr. Justice Macpherson.

MON MOHUN BUKSEE (DECREE-HOLDER) *v.* GUNGA SOONDERY DABEE (JUDGMENT-DEBTOR).*

1882
April 17.

Execution of Decree—Minor Plaintiff—Application for Execution by Guardian—Limitation Act (XV of 1877), s. 7.

A plaintiff, who has obtained a decree during his minority, has the option either of applying through his guardian to execute the decree during his minority or to wait until the expiration of his minority before executing his decree. The application of the guardian is the application of the infant. The minor is under disability during the whole period of his minority. His disability does not cease, because he, through his guardian, makes two or more applications for execution however long the interval between them, provided they are all made during his minority.

Baboo *Issur Chunder Chuckerbutty* for the appellant.

Baboo *Kissory Mohun Roy* and Baboo *Mohiny Mohun Roy* for the respondent.

THE facts of this case sufficiently appear from the judgment of the Court (WHITE and MACPHERSON, JJ.), which was delivered by

WHITE, J.—The Court below held that the execution was not barred by the law of Cooch-Behar, but that it was so by the law of British India, that being the law of the Court in

* Appeal from Appellate Decree, No. 342 of 1881, against the order of F. J. G Campbell, Esq., Judge of Rungpore, dated the 3rd September 1881, reversing the order of Baboo Denobundhoo Roy, Munsif of Kooreegram, dated the 3rd May 1881

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which the judgment was sought to be enforced, and the law defining the limitation for suits being part of the *lex fori*.

On appeal before us it is argued, that, assuming the question to be determinable by the Limitation Act now in force in British India (Act XV of 1877), yet by that Act the execution is not barred, for the plaintiff (the decree-holder) is a minor, and as such under disability, and therefore time does not run against him during his minority. It is not disputed that the decree-holder is a minor; and accordingly, under s. 7 of the Act, until his minority has ceased, he is not affected by the law of limitation. It is contended, however, for the respondent that, upon the true construction of s. 7, the minor must wait until he attains majority before suing out execution, and that, until then, he cannot, through his guardian, take any steps to enforce his decree. This contention is unsound, and is disposed of by the judgment of the Privy Council upon the corresponding section of the old Limitation Act, XIV of 1859, in the case of *Mussumat Phoolbas Koonwur* v. *Lalla Jogeshur Sahoy* (1). A plaintiff, who has obtained a decree during his minority, has the option either of applying through his guardian to execute the decree during his minority, or to wait until the expiration of his minority before enforcing his decree.

Another point was attempted to be argued, that, if the guardian of a minor commenced to execute the decree on his behalf during the minority, all subsequent applications by that guardian on the minor's behalf must be governed by the law of limitation. This argument also is unsound. It assumes, contrary to the law on the subject, that the application of the guardian is not the application of the infant, but something distinct. The minor is under a disability during the whole period of his minority. His disability does not cease, because he, through his guardian, makes two or more applications for execution, however long the interval between them, provided they are all made during the minority.

The order of the Judge is reversed, and that of the Munsif restored with costs in this Court and also in the lower Appellate Court. *Appeal allowed.*

(1) L. R., 3 I. A., 25-26

Before Mr. Justice McDonell and Mr. Justice Field.

DAVID (PLAINTIFF) *v.* GRISH CHUNDER GUHA (DEFENDANT).*

1882
June 30.

Mufassal Small Cause Court Act (XI of 1865), s. 6—Res judicata—Interest in Land—Jalkar—District Road Cess Act (Beng. Act X of 1871).

A suit to recover road cess and public works cess is not a claim for money on bond or other contract, but is a claim created and made recoverable by a special enactment of the Legislature, and does not fall within the provisions of s. 6 of the Mufassal Small Cause Court Act.

The decision of a District Judge deciding that the plaintiff is not entitled to sue in a suit for road cess, where the amount claimed is less than Rs 100, and therefore no second appeal lies to the High Court, is a bar to a second suit in which the amount claimed is above Rs. 100.

A jalkar does not impart any interest in the soil itself, and therefore a patni of a jalkar is not "an interest in land" within the meaning of the definition in the District Road Cess Act.

Baboo *Rashbehary Ghose* and Baboo *Lall Mohun Dass* for the appellant.

Baboo *Rajendro Nath Bose* for the respondent.

THE facts of this case sufficiently appear from the judgment of the Court (MCDONELL and FIELD, JJ.), which was delivered by

FIELD, J.—In this case the plaintiff is the proprietor of a *sair* mehal, or jalkar, which is No. 4000 on the rent-roll of the Furridpore Collectorate. The defendant holds under the plaintiff a patni, apparently of the whole of this property. The present suit is brought to recover the sum of Rs. 302-4 annas, on account of road cess and public works cess. A preliminary objection is taken that this is a suit of the Small Cause Court class, and therefore, as the amount is under Rs. 500, no second appeal will lie. It is contended that, with reference to the language of cl. 4 of the proviso to s. 6 of Act XI of 1865—

* Appeal from Appellate Decree, No. 2376 of 1880, against the decree of Baboo Nobin Chunder Gangooly, Subordinate Judge of Furridpore, dated the 10th of September 1880, affirming the decree of Baboo Girindro Mohun Chuckerbutty, First Munsif of Bhanga, dated the 25th of August 1879.

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"for any claim for the rent of land or other claim for which a suit may now be brought before a Revenue Officer,"—the claim in the present case is not a claim for which a suit could have been brought before a Revenue Officer at the time when Act XI of 1865 was passed. It is said, therefore, that the case does not fall within the proviso, but comes within the general words of s. 6 of the Act; and that the suit is therefore maintainable in the Small Cause Court alone.

We think it unnecessary to consider whether the suit comes within the language of the proviso or not, because it appears to us that this particular suit does not come within the general words of the section itself. We think that this is not a claim for money on bond or other contract. It is a claim created and made recoverable by a special enactment of the Legislature; and, in our opinion, does not fall within the provisions of s. 6 of the Small Cause Court Act.

The next contention is, that, so far as regards the road cess, the present claim is barred by a previous decision between the same parties, in which it was held that the plaintiff could not recover road cess. In that case the amount claimed was under Rs. 100; and inasmuch as the road cess is declared by the Act to be recoverable in the same way as rent, the provisions of Beng. Act VIII of 1869 were held applicable, and under the provisions of s. 102 of that Act, as the amount sought to be recovered was below Rs. 100, it was held that there was no second appeal; and the District Judge's decision was therefore final. It is now contended that, inasmuch as the amount sought to be recovered in the present case exceeds Rs. 100, and there is therefore a second appeal to the High Court, the principle of *res judicata* is not applicable. But it appears to us that the question as to the liability to road cess was decided by a Court of competent jurisdiction in the former case, and that therefore the principle of *res judicata* does apply. We may observe that the plaintiff could easily have secured his second appeal upon the point which he raises by waiting to sue until the amount sought to be recovered exceeded 100 rupees.

The third question raised is, whether public works cess can be recovered by the plaintiff upon this so-called patni. The

public works cess is provided for by Beng. Act II of 1877, which declares all immoveable property to be liable to the payment of a cess therein called the public works cess. Section 5 enacts that all holders of estates or tenures shall pay the public works cess at the rate determined under s. 4 and in the manner and the proportions prescribed for the payment of the road cess by the District Road Cess Act. Section 9 provides that the words and expressions 'house,' 'estate,' 'tenure,' 'district,' 'immoveable property,' 'holder of an estate, or tenure' shall have the meanings attributed to them respectively in the District Road Cess Act. The District Road Cess Act is Act X of 1871 of the Bengal Council, and the definition of 'tenure' as given in that Act is: 'tenure' "includes every interest in land, whether rent-paying or not, save an estate as above defined, and save the interest of a cultivating ryot." Now the question admittedly to be determined is, whether this patni of a jalkar is a tenure within the meaning of the term as used in the District Road Cess Act (Beng. Act X of 1871). 'Land' is defined in the same section to mean "land which is cultivated, uncultivated, or covered with water." It is to be observed that the language of the definition of 'tenure,' which "includes every interest in land," &c.—must be understood as not excluding all the usual and ordinary meanings of the word 'tenure.' It has not been contended before us that the word 'tenure,' apart from the above definition, would include a jalkar, and we think it impossible to say that it would.

Turning then to the definition, can we say that a jalkar is an interest in land, meaning by 'land,' land which is cultivated, uncultivated, or covered with water? It appears to us that we cannot say that it is such an interest. The question whether a fishery implies the ownership of the soil was discussed in England in the case of *Marshall* v. *The Ulleswater Steam Navigation Company* (1). It was there held that the allegation of a several fishery *primâ facie* imports ownership of the soil,—Blackburn, C. J., dissenting, although he held that the Court was bound by the authorities to that effect. Now, in England,

(1) 3 Best and Smith's Reps., 732.

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a several fishery may undoubtedly exist apart from any ownership of the soil under the water. It may exist as an incorporeal right. Where it exists as an incorporeal hereditament, it has been held not to be the subject of occupation, and therefore not to be ratable for the relief of the poor; and it required express words in the Rating Act, 37 and 38 Vict., c. 54, s. 3, to make rights of fishing when secured from the occupation of land, ratable for the relief of the poor. In this country we think that a jalkar does not necessarily imply any right in the soil. In the case of *Radha Mohun Mundul* v. *Neel Madhub Mundul* (1) it was said:—"It is quite familiar that jalkar rights are frequently granted extending over large estates, the property of other persons than the grantee of the jalkar; and it is clear that if, on the water drying up, the land below it become the property of these grantees, the most complicated questions of fact would constantly be arising, because long after the drying up of the beels, the Courts would be called upon to decide how far the water had originally extended, and, as in the very case before us, grants of jalkar are usually conveyed in such terms as to import the use and enjoyment of what may be called purely aqueous rights, such as fishing, gathering of rushes and other vegetation which arise from and are connected with water, and it may be very well conceived that if in such cases the right to the soil were implied in the grant of the jalkar, it would be wholly unnecessary to specify the particular rights. We have mentioned this because if the grantee were the owner of the land, he would, as a matter of course, be entitled to everything on it." Now, if a jalkar does not import any interest in the soil itself, we think it impossible to say that it is an interest in land within the meaning of the definition in the District Road Cess Act, land being there defined to mean land which is cultivated, uncultivated, or covered with water. We may further observe that, in Act VII of 1868 of the Bengal Council, the word 'tenure' is defined to include "all interests in land, whether rent-paying or lakhiraj (other than estates as above defined) and all fisheries." Now, if the word 'tenure,' in its ordinary accepta-

(1) 24 W. R., 200.

tion, included fisheries, it would have been unnecessary for the Legislature to say in so many words that in Beng. Act VII of 1868 it was to include fisheries. Beng. Act VII of 1868, it is to be observed, was passed before the District Road Cess Act (Beng. Act X of 1871); and if it can be contended that, in the latter Act, the omission of fisheries in the definition was due to an oversight of the Legislature, it is important to observe that no steps have been taken to remedy that oversight in the Cess Act (Beng. Act IX of 1880). The result would seem to be that the Legislature, by deliberately inserting 'fisheries' in the definition of 'tenure' in one Act, and omitting the same matter in the definition of the same word in another Act, passed for different purposes, intended that the term 'tenure' should not include fisheries in the latter Act. We think, therefore, that a patni of a jalkar is not a tenure within the meaning of the Road Cess Act.

The appeal is dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL.

NILMONI SINGH DEO (DEFENDANT) *v.* BAKRANATH SINGH (PLAINTIFF) AND THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

*P. C.**
1882
Feb. 6, 7, 8, & *Mar.* 10.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Jaghir—Inclusion of Jaghir Lands in Area of Settled Zemindari—Ghatwali Tenure—Reg. XXIX of 1814.

In the area of a zemindari were included at the Permanent Settlement the mauzas which made up the mehal of a jaghir, the succession to which was subject to the sanction of Government, the jaghirdar being bound to render public services. One-third of the revenue assessed upon the jaghir mehal was retained by the jaghirdar, forming no part of the zemindari assets on which the jama of the latter was fixed.

Held, that whether this jaghir was a ghatwali tenure or not, within the meaning of the term as applied in Reg. XXIX of 1814 (1), (the zemindari being Pachit, adjoining, and at one time included in, Birbhum,) the jaghir was analogous to such tenure as described in the preamble to the Regulation.

Present:—LORD BLACKBURN, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH, and SIR A. HOBHOUSE.

(1) Relating to "the lands held by the class of persons denominated ghatwals in the district of Birbhum."

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Held also, that the nature of the tenure had not been altered by the Permanent Settlement, after which the services due by the jaghirdar remained as before, public services, and continued to be due to the Government. That the zemindar became entitled only to the rent, or revenue, which was previously due to the Government, and in respect of which he was assessed, and did not become entitled to the services in respect whereof the one-third of the rent or revenue was allowed as compensation to the jaghirdar. That the jaghir, though hereditary, was not subject to the ordinary rules of inheritance according to the Hindu or the Mahommedan law, but was held upon the condition of approval of the heir by the Government. Thus were precluded both division of the jaghir mehal upon the death of the holder, and alienation during his life.

It followed that the jaghir mehal was not liable to attachment and sale in execution of a decree against the father and predecessor in estate of a jaghirdar so approved, as assets by descent in the possession of the latter.

Raja Lelanund Singh v. *The Government of Bengal* (1) followed.

APPEAL from a decree of the High Court (9th June 1879), made under the 15th clause of the Letters Patent of the High Court, 1862, which reversed a decree (21st April 1877) of a Divisional Bench, and restored a decree (25th November 1875) of the Judge of the District of West Burdwan.

The question on this appeal was, whether lands within the area of a permanently settled zemindari were held in jaghir independently of the zemindari; and were held on such a tenure that, in the possession of the jaghirdar, they were not assets by descent from his father and predecessor in estate, liable to be attached for the judgment-debt of the latter.

The suit—commenced in the Court of the Munsif of Gangajalghati, and transferred to that of the Judge of the West Burdwan District—was to obtain a declaration that nine mauzas, forming the mehal of a jaghir, in Pargana Moheshara, in the zemindari of Pachit, were not liable to attachment and sale under an order of 10th August 1874, in execution of a decree obtained in that year by the defendant, appellant, the Raja zemindar of Pachit, against Bir Singh, the father of the plaintiff, respondent, Bakranath Singh, the jaghirdar. The latter claimed the mouzas as held by him in jaghir, subject to certain public services due from him to the Government, which had sanctioned his succession to the jaghir in 1866.

(1) 6 Moore's I. A., 101.

The Raja zemindar maintained that the mauzas were not jaghir mehal but part of his malguzari lands, settled with a tenant by one of the Raja's predecessors, for services to be rendered to him as zemindar. Having been the property of Bir Singh, deceased, the interest of the jaghirdar was liable to attachment in the possession of his heir, and could be brought to sale in execution of the decree of 1874, in conformity with the Code of Civil Procedure.

The Government, joined as a defendant, supported the claim in its written statement, alleging that the land was held in jaghir, as a service tenure, subject to the jaghirdar's discharging public duties, and to the approval by the Government of his succession to the jaghir. The zemindari of Pachit, at one time included in the Birbhum District, was placed under special administration under Reg. XVIII of 1805. In 1847, it was transferred from Manbhum to the District of West Burdwan.

In 1817, the jaghir mehal, then 14¾ mauzas, was divided into two parts, as to both of which litigation ensued on the question of the Raja's rights as zemindar. In 1863 the Raja sued Bir Singh, the plaintiff's father, for resumption of 6¼ mauzas, part of the above, alleging that they had been granted by an ancestor of the Raja's for personal service, which was no longer either required or rendered. The dismissal of this suit by the Deputy Commissioner of Manbhum and the Judicial Commissioner of Chota Nagpore was followed by the rejection of a special appeal in the High Court—*Rajah Nilmoney Singh Deo* v. *The Government of Bengal* (1)—and an appeal to Her Majesty in Council was also dismissed (2).

In 1867, a suit by the Raja against the present jaghirdar, for arrears of rent accrued during the lifetime of his father Bir Singh, was dismissed in the local Courts, and a special appeal to the High Court was rejected, it being held that a new jaghirdar was not responsible for the rent due from a former one as such—*Raja Nilmonee Singh* v. *Bukronath Singh* (3).

But, in 1871, a claim for some villages, part of the above mehal, but other than those now in dispute, founded on an

(1) 6 W. R., 121. (2) 18 W. R., P. C., 321. (3) 10 W. R., 255.

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alleged appointment by the Government of the plaintiff as jaghirdar, was brought against the Raja in the case of *Udoychund Chuckerbutty* v. *The Raja of Pachit* (1). The High Court (Dwarkanath Mitter and Ainslie, JJ.), in dismissing this suit, decided that the tenure was one in which the Raja, as zemindar, was primarily interested.

In the present suit the Officiating Judge of the West Burdwan District (Mr. J. Tweedie) decreed for the plaintiff, finding that the service, of which the performance was a condition of the jaghirdar's tenure, was of a public nature, and was not rendered to the zemindar. The plaintiff's interest was not, in his opinion, salable in satisfaction of the debt of his father and predecessor.

On appeal to a Divisional Bench of the High Court (Markby and Romesh Chunder Mitter, JJ.), this decree was reversed, in accordance with the judgment of the senior Judge.

An appeal against this decree of the Divisional Bench was heard, under s. 15 of the Letters Patent of the High Court, by a Bench consisting of the Officiating Chief Justice, L. S. Jackson, J., and Ainslie and White, JJ. The proceedings in the Divisional Court and an appeal under the Letters Patent will be found reported in the 3rd volume of the Calcutta Law Report, p. 583.

The result was the reversal of the decree of the Divisional Bench, and a decree for the plaintiff according to the concluding words of the judgment above set forth.

From this decision the defendant appealed to Her Majesty in Council.

Mr. *R. V. Doyne* appeared for the appellant.

Mr. *J. Graham*, Q. C., and Mr. *J. T. Woodroffe* for the respondents.

The principal arguments on behalf of the appellant were, that the jaghir mehal had been included in, and assessed as part of, the lands of the permanently settled zemindari of Pachit; and that the jaghirdar's services, originally, were due to the Raja zemindar, as well as the rent for the land assessed. The jaghir was not a service tenure; and, having been Bir

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Singh's property, could be attached in the hands of his son, who had succeeded him by hereditary right. The respondents had not shown that, at the Decennial or at the Permanent Settlement, the Government retained any right of dispossessing the holder of this tenure, or of interfering with the course of descent. They had also failed to adduce sufficient evidence of any right continuously exercised by the Government to require police services from the jaghirdar for the time being, and such evidence as there was of calls upon the jaghirdar in this respect related to matters which could be ascribed to encroachment or misapprehension, but could not be held to be inconsistent with the hereditary character of the tenure. Two conditions of tenure assumed to exist had been made the basis of the judgment appealed against, *viz.*, the appointment of the jaghirdar by, and his rendering services to, the Government. But these had not been established as essentially belonging to the tenure; and notwithstanding the fact that the sanction of Government had been given to recent successions, still the tenure being ancient and of unknown origin had descended from father to son, and was held by hereditary right. In a great degree this had been admitted, the only qualification insisted upon being that the heir could not be a person considered by the Government to be unfit for the duties attached to the tenure. The estate had probably been created by a grant from some predecessor of the Raja zemindar before the year 1765, the services being originally due to the local chief; and it had not been shown that the services were other than such as, by usage, the zemindar, responsible for the good order of that part of the soubah of Behar, would have been entitled to claim from the holder of a subordinate tenure. Zemindars under the nawabi were entrusted as well with the defence of the territory against foreign enemies as with the maintenance of order within their boundaries. For this purpose they were accustomed to employ armed retainers to guard against hostile inroads, as well as a general police force, under the description of thannadars, paiks, and chaukidars, to repress crime in the villages—*Joyhishen Mookerjee* v. *The Collector of Burdwan* (1). From Bhagalpore to

(1) 10 Moore's I. A., 16.

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Midnapore extended a chain of service tenures, of which the holders were bound to assist their superiors in keeping the peace. Among these tenures the 'ghatwalis' of Bhagalpore had been held to form part of the permanently settled estate of the Raja of Karakpore, being included in his zemindari lands; and it had been decided that they were not thannadari or police lands, resumable on the Government's assuming charge of the police—*Raja Lelanund Singh* v. *The Government of Bengal* (1); Regs. XXXVII and XLII of 1793. The ghatwali tenures in Birbhum had been made the subject of special legislation in Reg. XXIX of 1814, which did not apply to the tenures now in question. Pachit, and the tenures within that zemindari, now forming part of the West Burdwan District, had been left to the operation of the general law. On the cardinal question what was the position of the zemindar in relation to this jaghir before the Decennial Settlement, the principal documentary evidence available was the following, as the records of the Birbhum Collectorate had been lost in the mutiny of 1857:

Letters from A. Higgenson, Supervisor of Birbhum, to S. Middleton, Chief Member of the Council of Revenue at Murshedabad in 1771, with Jammabandi Statement of the Pachit zemindari for that year.

A Letter from the same, with enclosures, to the Hon'ble Warren Hastings, 10th April 1774.

A Revenue Report of Lalla Kanji, Tehsildar of Pachit, 18th June 1799.

Collectorate Papers issued in Manbhum and West Burdwan.

Analytical View of the Revenues of Bengal by Mr. J. Grant, addressed to the Court of Directors in 1786, printed as an Appendix to the 5th Report of the Select Committee of the House of Commons on the affairs of the East India Company, 1820.

Shore's Minute, and Harington's Analysis of the Regulations.

Proceedings before Colonel J. F. Ouseley, Political Agent to the Governor General, May 1845.

(1) 6 Moore's I. A., 101.

Neither in the first settlement of 1771 made by Mr. Higgenson, nor in the Decennial Settlement of 1786 made permanent in 1793, was there anything to alter the hereditary character of the jaghir or its dependence upon the zemindari. Whether the settlement was mauzawar, or in the lump, did not appear; but the jaghir mehal was treated as part of the whole zemindari estate. That there might be such sub-tenures included in the Permanent Settlement, and covered by the jama, might be implied from the decision in *Raja Lelanund Singh* v. *The Government of Bengal* (1) from which case it appeared that there might be lands not liable to resumption under clause 4, s. 8, of Reg. I of 1793, as having been included in the allowances made to zemindars for police purposes. Thus there might be a tenure held conditionally on the performance of service due to the zemindar. Also might be cited *Joykishen Mookerjee's* case (2), above referred to, as showing that there might be chakeran tenures not resumable as thannadari lands under the Regulation, but annexed to the malguzari. Again it was to be noticed that it did not follow that, because the Government might disallow the succession of an unfit person, the jaghir could not be hereditary. It was hereditary, and because hereditary, it was alienable. Grants held 'naslan bád naslan,' 'butnan bád butnan,' as this jaghir was, were transferable by gift, sale, or otherwise, by the terms of Regs. XXXVII of 1793, and XII of 1805,—*Bithul Bhut* v. *Lalla Raj Kishore* (3). The supersession of the zemindari police establishments or thannadari system, discontinued on the 7th December 1792, had not altered the rights of the zemindar of Puchit over the jaghir in question. The new rules were enacted in Reg. XXII of 1793, which provided that the police of the country should, thenceforth, be under the exclusive charge of officers appointed by the Government. When this change took place, the Decennial Settlement (1789) had already been in force for some years; and therefore, until the Police Regulations of 1793, the jaghirdar must have been the subordinate of the zemindar for the repression of crime. After the latter date, the zemindar and the jaghirdar alike ceased to

(1) 6 Moore's I. A., 101. (2) 10 Moore's I. A., 16. (3) 2 Agra H. C., 284.

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be directly responsible in the police administration; but the effect of this was only to forbid the zemindar any longer to employ the jaghirdar in police duties. In other respects their relations to one another remained, and there was no transfer to the Government of the personal services due to the zemindar. Reference was made to Regs. XXII of 1793, VIII of 1814, XX of 1817, Mr. Shore's Minute (assessment of chakeran lands), and Harington's Analysis of the Regulations, vol. iii, pp. 239, 241. [Their Lordships inquired if the argument alleged that the jaghirdar, retaining one-third of the profits of the jaghir mehal, retained it free of services after the enactment of the Police Reg. XXII of 1793.] The jaghirdar no longer rendering police services to that extent gained. His duties, had he thenceforth been bound to render services to the Government, would have been defined. There was, however, no sufficient evidence as to the precise nature of the duties which the Magistrate could call upon him to undertake. The instances given did not, in any marked degree, exceed those services to which landholders were liable, as those services were defined in Reg. XX of 1817. The inference was, that such duty as he owed, he owed to the zemindar.

Reference being made to Lalla Kanji's Report (1799), (where it appeared that the jaghirdars acted under the control of the zemindar, upon whom fell the charges of police investigation, and where the duties of the digwar were distinguished from those of the jaghirdar), the true conclusion was, that the digwars rendering police services were paid by being maintained in holdings altogether rent-free. The jaghirdars, on the other hand, rendering only private services to the zemindars, held their mehals with only a partial remission of revenue. At this result the Judges had arrived in *Udoychund Chuckerbatty* v. *The Raja of Puchit* (1), in which case the High Court considered that the ouster of jaghirdars, in certain instances, others being appointed in their places, was unauthorized. There was, in effect, no sufficient evidence of the Government's having had originally the right of appointment; and no such long and uniform series of appointments

(1) Unreported.

by it had been shown, as would lead to the presumption that the right existed.

For the respondents it was argued that the jaghir mehal was not saleable in execution of the decree. It had been rightly decided that the jaghirdar's services were due to the Government, and not to the zemindar; also that sanction was necessary to the succession of each holder of the tenure. These two conditions were inseparable, and the right of the Government to approve the person who was to be responsible for the services would be defeated by alienation of the tenure; which, therefore, could not be transferred. Reference to the state of things before 1765 did not assist the argument for the appellant. For no zemindar, or any authority less than the ruling power of the day, could make any valid remission of the proportion of the produce of the lands due to it, without the sanction of that power: Regs. XXXVII and XLIV of 1793, preamble. *Rajah Nilmoney Singh Deo* v. *The Government of Bengal* (1) decided, in accordance with general principles, that the zemindar had no right to grant rent-free tenures.

Again, it was an error to assume that lands could not be held subject to police services without such duties being identical with those which all landholders in Bengal had to perform, and setting aside any ambiguity that had arisen as to the question of the services, the main consideration on which the decision of the case would rest was that, at settlement, one-third of the profits of the mehal was not brought into the estimate of the zemindari assets. To this remitted revenue, a jaghir in its strict sense, the terms of the Regs. XXXVII of 1793, s. 15, and XII of 1805, in regard to the heritable and transferable quality of certain estates, were inapplicable, as also was the decision cited in *Bithul Bhut* v. *Lalla Raj Kishore* (2). In what way, save by the dismissal of the jaghirdar by the Government, the tenure could be alienated, did not appear.

In 1771, when first these jaghirs, which had existed from time immemorial, were brought to notice, the jaghirdars received recognition from the supervisor of Birbhum, paying two-thirds of

(1) 6 W. R., 121. (2) Agra H. C., 284.

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the profits of their lands, and retaining one-third as their remuneration for their services. At the Decennial Settlement, the jaghirs were included in Chakla Pachit, but the zemindar's jama was calculated on the two-thirds payable by the jaghirdars, and not on the one-third retained by them. Reference was made to 3 Harington's Analysis, 413, *Binode Ram Sein* v. *The Deputy Commissioner of the Sonthal Parganas* (1), *Rajah Nilmoney Singh Deo* v. *Bukronath Singh* (2), *Raja Lelanund Singh* v. *The Government of Bengal* (3), *Forbes* v. *Meer Mahomed Tuquee* (4), *Koldeep Narain Singh* v. *The Government of Bengal* (5), and *Sertukchunder Dey* v. *Bharut Chunder Singh* (6). This tenure, but for the operation of Reg. XVIII of 1805, would have remained within the Birbhum Zilla jurisdiction, and would have been subject to Reg. XXIX of 1814. The Deputy Commissioner of Manbhum, in *Rajah Nilmoney Singh Deo* v. *The Government of Bengal* (7), showed how the tenure corresponded to the 'ghatwali' of Birbhum, adding that the jaghirs were spoken of in the district as 'ghats,' the jaghir in suit being 'Ghat Dhekia.' The same arrangements were found in these jaghirs as in ghatwali tenures, *viz.*, of 'tabedars' working under the jaghirdar, who was also called the 'sirdar,' and holding smaller portions of land in his jaghir.

The admission made as to the hereditary character of the tenure went no further than the statement made in Harington's Analysis, 509, in connection with the Birbhum ghatwals: meaning only that the Government usually appointed the son unless there was something to disqualify him.

Mr. *R. V. Doyne* replied.

Their Lordships' judgment was delivered by

SIR B. PEACOCK.—This is an appeal from a decree of the High Court at Calcutta. The appellant is Raja Nilmoni Singh, the raja and zemindar of Pachit. He was the defendant in the suit out of which the appeal arises, and which was brought

(1) 7 W. R., 178.
(2) 10 W. R., 255.
(3) 6 Moore's I. A., 101.
(4) 13 Moore's I. A. Ca., 438.
(5) 14 Moore's I. A. Ca., 247.
(6) 7 S. D. A. (1858), 900.
(7) 6 W. R., 121.

against him by the respondent, Bakranath Singh, for confirmation of possession of a jaghir mehal, consisting of Mauza Dhekin and other mauzas specified in the schedule to the plaint, by establishing his title to the same, and reversing a summary order of the 10th of August 1874.

It appears that the appellant, having obtained a decree against Bir Singh, the father of the respondent, for the sum of Rs. 72 odd, awarded to him for costs, had caused the mauzas in question to be attached in execution of the decree; and that, on the 11th June 1874, a proclamation was issued for the sale of the right, title, and interest of the judgment-debtor therein on the 10th of August in that year. In the proclamation the plaintiff was described erroneously as the judgment-debtor, whereas he was only the heir-at-law against whom the decree had been revived after the death of his father, Bir Singh.

On the day appointed for the sale, the respondent presented a petition, stating that he was not in possession of any property of the deceased judgment-debtor, and that the Government jaghir mehal could not be sold on account of the debts of the deceased; that, since the death of his father, the late Bir Singh, he had been appointed jaghirdar, and was in possession of the mauzas attached as ghatwal appointed on the part of Government; that the decree-holder, without describing the mauzas to be jaghir, and without stating the nature of his father's interest therein, had secretly done the acts relating to the execution of his decree; and that the petitioner, having received information that the jaghir mehals would be sold on the 10th of August, had presented the petition stating his objections. Upon that petition the summary order referred to in the plaint was passed by the Munsif;—"This petition of claim has been filed to-day just before the sale; the claim cannot be allowed at such a time. It is ordered that the petition of claim be rejected." The sale accordingly took place, and the present appellant became the purchaser.

The suit, out of which this appeal arises, was originally instituted in the Court of the Munsif of Choki Gangajalghati, in the District of West Burdwan, and the Secretary of State for India was made a *pro formâ* defendant The suit was subse-

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quently removed into the Court of the Judge of West Burdwan.

The Government put in a written statement, in which they alleged that the lands were police service lands, and that they had been held by jaghirdars in lieu of wages for the performance of police duties from before the Permanent Settlement, as had been formerly determined in the presence of the Raja defendant by the Deputy Commissioner of Manbhum, in case No. 105 of 1863, and the several Courts of appeal; that the lands not being transferable, and the Raja defendant having caused them to be sold without any specification that they were service lands, and having himself purchased them at the sale, could acquire no title by the purchase.

The Raja defendant, in his written statement, contended, amongst other things, that the mauzas were not a jaghir constituting Government property, but part of his permanently settled *mal* estates, and that they had been granted by his father to the plaintiff's father as a service tenure.

Further, he made the following statement:—

"Third 'Taruf Dhekia,' in which these mauzas are comprised, was divided into two (equal) parts, one of which is plaintiff's ancestral property, and the other was enjoyed by Dhurmo Das Chuckerbutty as a service tenure in the manner described above. Subsequently, the half share of Taruf Dhekia, held by the said Dhurmo Das, having been sold by auction for arrears of rent, his grandson, Udoy Chuckerbutty, brought a civil suit to set aside the sale, alleging the share to be Government jaghir property; but, in the judgment of the High Court, the suit was dismissed, on declaration that the disputed estates appertained to the *mal* land, and in rejection of the allegation as to the Government jaghir lien, as will appear from the decision. Therefore the plaintiff's suit is evidently false."

The plaintiff himself was examined, and stated that his profession was that of a ghatwali jaghirdar; that he was jaghirdar of Ghat Dhekia; that he was appointed in 1273 by the Magistrate of Bancoora, and served the Government and carried out the orders issued by the thanna; that the jaghir lands did not remain in his possession unless he performed the services; that the

person who is appointed in the place of a dismissed ghatwal holds possession of the land; that, after his appointment, the sub-inspector put him into possession; and that he never did any service for the Raja, and did not receive any permission from the Raja on his appointment.

Amongst other issues, the following were raised:—

2nd. Whether the status or condition of the lands as Government service,—*i. e.*, ghatwali or jaghir,—had been decided in a former suit by a Court of competent jurisdiction?

3rd. Whether the land in suit was held by the plaintiff as service land,—*i. e.*, ghatwali or jaghir—under Government, or as service land under the defendant, Raja Nilmonee Singh?

4th. Whether the land was land on account of which rent was paid to the Raja by the Raja's appointee, and whether this rendered the tenure a saleable one?

5th. Whether the plaintiff's interest in the land was such an interest as admitted of being brought to sale in satisfaction of a decree due from the plaintiff's predecessor to the Raja.

The case was tried by the Officiating Judge of West Burdwan. On the trial the Government accepted the full burthen of the suit, and supported the plaintiff. It still holds the same position, having been made a respondent, and having appeared by Counsel before their Lordships and opposed the appeal.

The only substantial question to be decided is, whether the mauzas in question, which had been held by the plaintiff's father during his lifetime, and which at his death descended to the plaintiff as his heir, and to which the plaintiff was appointed by Government, were liable to be seized in execution of a decree against the father as assets by descent in the hands of the plaintiff, his son.

Neither the origin of the jaghir, nor the precise time at which it was created, is known; but it appears that, as far back as 1771, corresponding with 1178 B. S., the villages of which it was composed were held by jaghirdars, who paid to Government two-thirds of the annual value thereof as revenue, and retained the other one-third as remuneration for the services under which the jaghir was held. The villages included in the

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jaghir were permanently settled as part of the zemindari of Pachit, of which the defendant, appellant, is the zemindar. In fixing the Government revenue at the time of the Decennial Settlement, the lands included in the jaghir were assessed at the two-thirds then payable by the jaghirdar to the Government, and the one-third retained by the jaghirdar in lieu of services formed no part of the assets of the zemindari in respect of which the Government revenue was fixed.

Jaghirdars were successively appointed or approved by Government up to the time of Gurucharn Mukerji, who was appointed in 1816 in the place of Rup Singh, who was dismissed for misconduct.

In February 1817, Gurucharn petitioned the Magistrate for leave to associate Dhurmo Das Chuckerbutty with himself as headman; this was sanctioned, and they divided the jaghir and the duties. On the death of Gurucharn, his son applied to be installed as his successor, but Rup Singh having applied to be reinstated, his application was granted. In 1834, Rup Singh attempted to oust Dhurmo Das Chuckerbutty, but this was not allowed, and the jaghir has ever since remained divided.

It was contended, on behalf of the appellant, that, as the lands were included in his permanently settled zemindari, the services as well as the rent belonged to him; that the services were private services, and that he had a right to cause the lands to be sold in execution of his decree.

In support of his case, the decision of the High Court referred to in the Raja's written statement was cited. It is set out in the appendix to the record, and was in a suit brought against the Raja by Udoy Chuckerbutty, who had been appointed successor of Dhurmo Das Chuckerbutty, to obtain possession of the mauzas which constituted that portion of the jaghir, which, upon the division of it, had been allotted to Dhurmo Das, whose right and interest had been sold by the Raja in execution of a decree for rent obtained by the Raja against him. The Government was a party to that suit, and supported the claim of the plaintiff therein. The first Court held that the plaintiff had a right to recover possession of the jaghir lands, but that decision was reversed on appeal by the High Court.

In speaking of that case, the Officiating Judge in the present case remarked:—"It is not relevant as evidence in this case, but is useful as a precedent or in argument. The Court found in that case that the services exacted by Government were encroachments of the Raja's rights, and that the duties,—*i. e.*, service,—attached to the holding of the land, and not the holding of the land to the appointment to perform the duties. With respect to the lands in dispute I have to remark that the Raja's evidence in this case, as well as that of the Government, shows that the opposite is true in this case." Then, after referring to the evidence, he says:—"I therefore conclude that the performance of the services is the chief title to the jaghir lands, and that no man has any right to hold these lands except on a title arising out of a valid appointment to discharge the services; to adopt the words of the High Court's judgment," or rather the converse of it, "to the facts of the case, 'the holding of the lands attaches to the duties, and not the performance of the duties to the holding of the land.'" On the 3rd issue he found that the land in suit was land held by the plaintiff, Bakranath Singh, as service under Government, *i. e.*, not ghatwali but jaghir land, and was not held as service under the Raja. On the 4th issue he found that the land in suit was not land on account of which rent was paid to the Raja by the Raja's appointees; and on the 5th, that the plaintiff's interest in the lands was not such as admitted of its being brought absolutely, and without special conditions, to sale in satisfaction of a decree due from the plaintiff, or his predecessor, to the Raja; but that the interest was saleable for the purpose aforesaid, provided it be sold subject to the performance of the jaghir services by the purchaser, after he has obtained appointment to the duties at the hands of the Magistrate or his representative police authorities, and installation by the same authorities. He accordingly annulled the sale of the lands under the execution, set aside the summary order of the Munsif, and declared that the plaintiff had a right to continue in possession as the service tenant of the Government, and as the rent-paying tenant to the plaintiff. The case was appealed to the High Court. The appeal was heard by a Division Bench, consisting of Mr.

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Justice Markby and Mr. Justice Romesh Chunder Mitter, who differed in opinion. The decree of the Officiating Judge was reversed, and the suit dismissed in accordance with the opinion of the Senior Judge, Mr. Justice Markby. Mr. Justice Romesh Chunder Mitter dissenting, and holding that the decree ought to be affirmed.

Mr. Justice Markby agreed with the Officiating Judge that the Raja had not shown that the plaintiff held as his appointee; he relied upon the fact that the lands were part of the revenue-paying lands of the Raja, and also upon an admission of the Advocate-General, on behalf of the Government, that the tenure was an hereditary one, unless there was some special objection to the person entitled to succeed. He also relied very strongly upon the decision in Udoy Chund Chuckerbutty's case, already referred to, and added,—"An appeal against this decision was lodged in the Privy Council by the Government, but it has not been prosecuted; and it is admitted that there is no intention to prosecute it." He stated that he thought it was his plain duty to follow the former decision, unless he had the clearest possible reasons for differing from it; and that so far from differing from the decision, having considered the evidence and heard the arguments, he entirely concurred in it. He then proceeded to discuss the question whether the fact that the holders of the lands were liable to perform some services of an exceedingly indefinite character, but something of a police kind, to Government, took away from this tenure the character of alienability, which it would otherwise possess, and expressed his opinion that it did not.

An appeal was preferred under s. 15 of the Letters Patent of the High Court from the decree of the Division Bench to the High Court, and was heard by Mr. Louis S. Jackson, then Officiating Chief Justice, Mr. Justice Ainslie, and Mr. Justice Sewell White, when the decree of the Division Bench was reversed, and the decree of the first Court affirmed, by a majority consisting of the Acting Chief Justice and Mr. Justice Sewell-White against the opinion of Mr. Justice Ainslie. Their Lordships concur generally in the view taken by Mr. Justice Romesh Chunder Mitter and the Acting Chief Justice, and are of opinion

that the decree now under appeal ought to be affirmed. The judgment of Mr. Justice White was founded merely upon the form of the proclamation; he concurred with the first Court in holding that, as the proclamation did not describe the lands as held under a service-tenure, the sale to the Raja, under the execution, passed no title to the property; and he abstained from expressing an opinion upon the question as to which Mr. Justice Markby and Mr. Justice Romesh Chunder Mitter differed,—*viz.*, whether the interest of the plaintiff's deceased father in the lands was such, that when they came into the possession of the plaintiff they were assets of the father, and as such liable to be attached and sold for his debts.

According to the report of Lalla Kanji, Tehsildar of Pachit, made on the 18th of July 1799, it appears that there were in Chakla Pachit, in addition to the digwars, three other classes of guards, whom he describes as jaghirdars, ghatwals, and chaukidars. He says of the first, they hold their mauzas in jaghir, and whenever the digwars require assistance in arresting thieves or rioters, the jaghirdars assist them with their men. Of the second, that is the ghatwals, he says the second were posted at the ghats, 36 in number. In 23 of these the ghatwals were subordinate to the digwars, and were paid by them out of their jaghirs; 13 are occupied by the Raja's own immediate servants paid by him.

It is clear that the jaghirdar in question was not one of the ghatwals referred to in the report as being subordinate to, and paid by, the digwars out of their jaghirs, for they were paid by the one-third of the malguzari, which they were allowed to retain as a compensation for their services.

Mr. Justice Romesh Chunder Mitter held, that the tenure in question was analogous to a ghatwali tenure. Mr. Justice Ainslie treated it as one of the ghatwalis to the south of Birbhum. Their Lordships entertain no doubt that, whether it was a ghatwali or not, the tenure was analogous to a ghatwali tenure of the nature described in the preamble to Reg. XXIX of 1814; and the Acting Chief Justice appears to have entertained the same view, by referring to Mr. Harington's Analysis of the Regulations, vol. iii, p. 509, where, after mentioning Reg. XXIX

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of 1814, he goes on to say,—tenures of this description were mentioned generally in a note to the second volume of this Analysis, as held at a low rent by ghatwals or guards of passes.

The preamble to Reg. XXIX of 1814 is as follows:—"Whereas the lands held by the class of persons denominated ghatwals, in the district of Birbhum, form a peculiar tenure to which the provisions of the existing Regulations are not expressly applicable, and whereas every ground exists to believe that, according to the former usages and constitution of the country, this class of persons is entitled to hold their lands generation after generation in perpetuity, subject nevertheless to a fixed and established rent to the zemindar of Birbhum, and to the performance of certain duties for the maintenance of the public peace and support of the police." Pachit was formerly one of the parganas and mehals of Zilla Birbhum, but by Reg. XVIII of 1805 was separated from the jurisdiction of the Magistrate of that zilla, and placed under the jurisdiction of a distinct officer denominated Magistrate of the Jungle Mehals (*see* ss. 2 and 3 of that Regulation). Their Lordships consider that the jaghir in question, although not falling within the Regulation, was a tenure of the nature of those described in the preamble. In the case of *Rajah Nilmoney Singh* v. *The Government of Bengal* (1), it having been found by the lower Courts that the lands were held upon a ghatwali tenure, the High Court upon special appeal held, that they were not resumable by the zemindar, upon the ground that the tenure had been forfeited on account of the tenant's refusal to perform them. The Chief Justice remarked,—"If the Government received only two-thirds of the annual value of the lands as rent or revenue, and allowed the tenant to retain one-third on account of services, the services must have been public and not private. The Government would not have allowed any portion of their revenue in consideration of private services to be rendered to the zemindar."

That case was affirmed by Her Majesty in Council on appeal (2).

The permanent settlement of the lands did not alter the nature of the jaghir or of the tenure upon which the lands were

(1) 6 W. R., 121. (2) 18 W. R., P. C., 321.

held, nor could it convert the services which were public into private services under the zemindar. The zemindar became entitled only to the rent or revenue which was previously payable to the Government and in respect of which he was assessed, and not to the services in respect of which the one-third of the rent or revenue was allowed to the tenant as compensation for the services. Those services continued to be due to the Government.

In the very luminous judgment pronounced by Lord Kingsdown in the case of *Rajah Lelanund Singh* v. *The Government of Bengal* (1), the origin and nature of the ghatwali tenures of Birbhum, and the effect of the Permanent Settlement thereon, were fully explained, and it was there held that lands held under that tenure were not resumable by Government under Beng. Reg. I of 1793, s. 8, cl. 4, as lands included in the allowances to zemindars for thana or police establishments. In that case it was no doubt held, that it was the province of the Raja of Khurruckpore to appoint and dismiss the ghatwals (p. 127), but it was also stated that ghatwals held their lands in virtue of sanads granted by the zemindar, except some who had received theirs from the former authorities (p. 123); it was also found that in that case the lands had been granted by the ancestors of the Raja (p. 112), and it was said that the Regulation did not apply to lands which the zemindars had permitted other persons to hold free from rent, or at a reduced rent, or (referring to the cases in which the sanads had not been granted by the zemindar) to lands which such persons had a right to hold free from rent or at a reduced rent.

The above cases show that the jaghirs of which the lands in question formed one, and which were expressly found, in the case above referred to between the appellant and Bir Singh, the father of the plaintiff, and also in the present case, to be analogous to the ghatwali holdings of Birbhum, are not resumable by the zemindar or by the Government.

In the case of *Hurlal Singh* v. *Jorawun Singh* (2), cited with approbation by Lord Kingsdown, in 6 Moore, 125, it was held,

(1) 6 Moore's I. A., 101. (2) 6 Sel. Rep., 204, Ed. of 1873.

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that the ghatwali tenures were not divisible on the death of a ghatwal, but descended to the eldest son.

In delivering the judgment in that case Mr. F. C. Smith said,—"Reg. XXIX of 1814 says nothing on the subject, the point must, therefore, be decided with reference to the usual practice and the meaning and intent of the term 'ghatwal.' Now the ghatwali lands are granted for particular purposes, especially of police, and to divide them into small portions amongst the heirs of the ghatwals would be to defeat the very ends for which the grants were made. I have submitted the question to the Judges of the Court, and all, with one exception, are of opinion, that a mehal of this nature cannot be divided, but should, on the death of an incumbent, devolve entirely on the eldest son, or the next ghatwal."

It was stated by Mr. D. C. Smith, one of the Judges consulted, that the chakeran lands of Bengal always go to the eldest son or to the nearest member of the family most capable of performing the duty. See also *Kustoora Koomaree* v. *Monohur Deo* (1).

These jaghirs, although hereditary, are not governed by the ordinary rules of inheritance, under the Hindu or Mahomedan law, and are subject to the condition of the Government's approval of the heir.

The same principle which precludes a division of a tenure upon death must also apply to a division by alienation. Their Lordships are of opinion that the tenure is not transferable or salable in execution of a decree, and that it is not one of the tenures referred to by the Beng. Reg. XXXVII of 1793, s. 15.

In the case of *Rajah Lelanund Singh* v. *Doorgabutty* (2) it was held, that the ghatwalis of Khurruckpore were not capable of alienation by private sale or otherwise, nor liable to sale in execution of decrees except with the consent of the zemindar and his approval of the purchaser as a substitute for the outgoing ghatwal. In that case, however, as in the case already cited from 6 Moore's Indian Appeals, the ghatwal had been appointed by the Raja, and the Raja, and not the

(1) W. R., Sp. No., p. 39. (2) W. R., Sp. No., p. 249.

Government, as in the present case, had a right to appoint and dismiss the ghatwal.

In the case of *Binode Ram Sein* v. *The Deputy Commissioner of the Sonthal Parganas* (1) it was held, and in their Lordships' opinion rightly, that the surplus proceeds of a Birbhum ghatwali tenure, which had passed by descent from ancestor to heir, were not liable, in the hands of the heir, for the debts of the ancestor; and reference was made to a decision of Mr. Hawkins in the Sudder Court, 2 Sevestre's Reports, 423, in which it was held that the lands were not alienable.

In a case also between the appellant and the respondent Bakranath Singh it was held, that the holder of the tenure in question in this suit is not responsible for the debts of a former jaghirdar. The Deputy Commissioner in his judgment said,—"As jaghirdar, the defendant has, what his father had, a life-interest in the jaghir. Whether the son will succeed or not is, notwithstanding the tenure is hereditary, uncertain, as he may at any moment be dismissed from Government employ," rather he should have said 'may never be sanctioned as jaghirdar.' He proceeds,—"The jaghir is strictly a life-tenure as far as the jaghirdar is personally concerned, he holds the land in lieu of pay, and a new jaghirdar receiving the jaghir would not be bound by any arrangement made by his predecessor. A newly elected jaghirdar would not be held responsible for debts incurred by the late jaghirdar as such, as were he to be so, he would lose the benefit of his pay. Thus, a jaghirdar cannot be held responsible for arrears of rent due by a former jaghirdar." That decision was upheld on appeal to the High Court (2). The case is expressly in point, for if a successor is not liable for rent of the jaghir due from his predecessor, it follows *à fortiori* that he cannot be liable for an ordinary debt. It is unnecessary to decide whether the decision is *res judicata* or not.

The above decisions are more than sufficient to outweigh the decision in the case of *Udoy Chand Chuckerbutty* (3) to which Mr. Justice Markby attached so much weight, even if that case had not been decided upon a different finding of facts.

(1) 7 W. R., 178. (2) 10 W. R., 255 (3) Unreported.

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Their Lordships, however, are of opinion that the learned Judges took an erroneous view in that case of the effect of the Permanent Settlement.

With reference to the argument upon which Mr. Justice Ainslie so strongly relied as to the difficulty under which the zemindar would lie for the recovery of his rent if the lands could not be sold in execution of a decree for rent against his tenant, it is sufficient to say that the zemindar, at the time of the Permanent Settlement, must have been aware of the nature of the tenure upon which the lands were held, and that this case does not involve the necessity of deciding what remedy the zemindar has for recovering his rent, whether by sequestration of the estate or by application to the Government to remove the tenant, or by what other mode. Their Lordships, therefore, abstain from expressing any opinion which would be a mer *cobiter dictum* upon the point.

It is quite clear that, if the jaghir were transferable without the consent of Government, either by descent to an heir, or by voluntary sale, or sale in execution, or otherwise, there would be no security that the transferee would be a proper person to discharge the duties in respect of which the lands are held at the reduced rent. The transferee might be a person of questionable or even of bad character, as remarked by the Court in 10 W. R., 240.

For the above reasons, their Lordships will humbly advise Her Majesty to affirm the decree of the High Court, from which the appeal has been preferred, and to dismiss the appeal.

The appellant must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Lambert, Petch* and *Shakespear.*

Solicitors for the respondent: Mr. *H. Treasure.*

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Maclean.

HURBANS SAHYE AND OTHERS (DEFENDANTS) *v.* THAKOOR PURSHAD (PLAINTIFF).*

1882 *March* 2.

Civil Procedure Code (Act X of 1877), s. 630—Review of Judgment—Review granted on particular Ground—Discretion of Court as to Rehearing.

Where a review of judgment is granted on a particular ground, the Court is not bound to rehear the whole case under s. 630 of the Civil Procedure Code: it is in the discretion of the Court to rehear the whole case or only the particular point on which the review has been granted.

THIS was an application for review in a suit brought by the plaintiff to recover possession of certain property on the allegation that it was his self-acquired property.

The plaintiff's case was that the property in suit had been sold under a decree passed on a mortgage-bond executed by his nephews, the first three defendants, who had no right or interest in the property; that, in execution of the proceedings following the sale, he had been dispossessed by the auction-purchasers, Zakur Alum and Hurbans Sahye, the fourth and fifth defendants; and that after he had put in a petition of objection to the Court by which the decree had been passed, and which petition was rejected, he brought this suit, making the parties above-named, together with the two decree-holders, defendants.

The auction-purchaser defendants alleged, that the plaintiff was never in possession within twelve years before the institution of the suit, and therefore the suit was barred by the law of limitation; that the property in dispute was acquired by the plaintiff's father, and in accordance with a tuksminama, dated 5th April 1854, the property fell to the share of Ram Sahye Singh, the father of the first three defendants, other properties

* Application for review against the judgment of Mr. Justice Mitter and Mr. Justice Maclean, dated the 9th May 1881, in appeal from Original Decree, No. 25 of 1879.

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being allotted to the plaintiff; that Ram Sahye and his sons continued in possession of the property; that his sons borrowed money from the sixth defendant, Neaz Mahomed, and gave him a bond, mortgaging this property; and that the property had been sold in execution of a decree obtained on the bond and purchased by themselves. The Subordinate Judge dismissed the suit, finding the facts as alleged by the defendants. On appeal the High Court found that the property had been in the joint possession of the plaintiff and his two brothers, and afterwards, on the death of one brother, in the possession of the plaintiff and the other brother, and gave a decree in favour of the plaintiff for one-half of the property claimed.

The defendants applied for a review of judgment, and a rule being issued to show cause why the application should not be granted, other evidence was brought forward to show that the plaintiff had, before the death of his brother, separated from them, taking one-third of the property, and that, therefore, the decree should be altered; and it was contended that, in case the review was granted on this ground, the whole case should, under s. 630 of the Civil Procedure Code, be re-heard. On the review the Judges differed in opinion in one point,—*viz.*, as to whether the plaintiff was, on his cause of action and allegations, entitled to the relief he had obtained; MITTER, J., being of opinion, that he was, and MACLEAN, J., that he was not.

Mr. *Branson*, Baboo *Mohesh Chunder Chowdhry*, and Baboo *Chunder Madhub Ghose* in support of the application.

Baboo *Mohinimohun Roy* and Baboo *Tarucknath Palit*, *contra*.

The judgments of the Court, omitting the portion on the merits as not being material to this report, were as follows:—

MITTER, J.—It has been contended that, if the review be granted on a particular ground, we are bound to re-hear the whole case under s. 630 of the Code of Civil Procedure; but the words "or make such order in regard to the re-hearing as it thinks fit," in the section in question, leave it to our discretion either to re-hear the whole case or any particular point

that seems to us fit. The observation of the Judicial Committee in *Bhugwandeen Doobey* v. *Myna Baee* (1) supports this view. As we have re-heard the case with reference to the question of share, I am of opinion that we are in a position to make the final decree without another hearing. Our decree, therefore, should be altered as directed above. The petitioners are entitled to recover costs of this hearing, which I would assess at Rs. 200.

MACLEAN, J.—I find with regret that I am of a different opinion from my learned and more experienced colleague upon one of the points raised in this application,—namely, the first point discussed in the judgment just read.

On this question, however, our former decision must stand for the present under s. 628 of the Code.

On the other questions I do not differ from my colleague, and I think that we are not precluded from dealing with the case in part or as a whole by anything in s. 630, it being within our discretion to define the extent to which the review should be carried; see *Bhugwandeen Doobey* v. *Myna Baee* (1).

Decree varied.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Bose.

BEER CHUNDER MANICKYA (PLAINTIFF) *v.* HURRO CHUNDER BURMON (DEFENDANT).*

1882 *July* 12.

Limitation—Rent Law (Beng. Act VIII of 1869), *s* 30—*Special Agreement.*

The defendant was tehsildar of one of the plaintiff's zemindaris, and after his dismissal on the 24th of August 1876, he submitted an account, which was found to be incorrect, and time was given to him to make good certain items on his executing an ikrar, promising to pay whatever balance should be found due from him to the plaintiff. In a suit brought on the 28th of October 1878 to recover the balance found on inquiry to be due,—*held*, that s. 30 of Act VIII of 1869 had no application, the special agreement taking the case

* Appeal from Appellate Decree, No. 1784 of 1880, against the decree of W. F. Meres, Esq., Officiating Judge of Tipperah, dated the 11th June 1880, affirming the decree of Baboo Kalidas Dutt, Second Subordinate Judge of that district, dated the 9th of May 1879.

(1) 11 Moore's I. A., 499.

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out of the scope of that section, and therefore the suit was not barred by reason of having been brought more than one year after the defendant's dismissal.

Baboo *Kali Mohun Dass* and Baboo *Durga Mohun Dass* for the appellant.

Munshi *Serajul Islam* and Baboo *Chunder Madhub Ghose* for the respondent.

THE facts of this case are sufficiently stated in the judgment.

The judgment of the Court (GARTH, C. J., and BOSE, J.) was delivered by

GARTH, C. J.—The circumstances under which this case arose are these:—

The plaintiff Moharaja appointed the defendant as tehsildar in one of his zemindaries on the 22nd Aghran 1283 T. S. The defendant worked as such up to the 9th Bhadur 1285 T. S., when he was dismissed. The defendant, on the 14th Bysack 1286 T. S., submitted an account of the collections and disbursements during the period of his service, but the Moharaja's officers took exception to several of the items, and made out a balance of Rs. 2,578 annas 15 pie 6 against him. The Moharaja was prepared to sue the defendant for recovery of this balance, but the defendant asked for time in order to enable him to make good the items by producing vouchers, as also by mofussil inquiry. The Moharaja consented to give time to the defendant upon his executing an ikrar, with a promise to pay whatever balance would be found due from him upon such inquiry. The defendant accordingly gave a registered ikrar on the 23rd Chyet 1286 T. S., which (amongst other things) provided that he, the defendant, "would furnish lowazima papers in support of his said account, and would wait on the Moharaja's officers in the mofussil while making the inquiry, and come to an adjustment of his account within six months from the date of the ikrar; and would pay, without objection, whatever money should be found

due from him upon such mofussil inquiry and investigation by the Moharaja's agent within three months from the date of its ascertainment." An inquiry was subsequently made by the Moharaja's agent in the presence of the defendant, when, on the 25th Ashar 1287 T. S., a sum of Rs. 1,870 annas 7 pie 6 was found to be due from him. The Moharaja accordingly brought this suit on the 28th October 1878 for recovery of the said amount.

Both the lower Courts have applied s. 30 of the Rent Act to the case, and have held that the suit is barred, because more than one year has elapsed since the date of the defendant's dismissal, as also since the date when the misappropriation by the defendant was first detected.

We are clearly of opinion that the suit is not governed by s. 30 of the Rent Law. It is not a suit brought under ordinary circumstances for money in the hands of an agent, or for the delivery of accounts or papers. It is brought upon a special agreement, by which it was agreed on both sides that, for the purpose of ascertaining the correct amount due from the defendant to the plaintiff, an investigation was to take place and certain accounts and other papers were to be supplied by the defendant, in order to enable the plaintiff's agent to arrive at the truth, and a certain time was to be given to the defendant to pay the money, after this investigation had taken place.

A special agreement of this kind takes the case entirely out of the scope of s. 30. It would be a positive fraud upon the plaintiff, who has behaved very fairly in the matter, to allow him to be defeated by limitation under such circumstances; and it was nothing short of a fraud for the defendant to take such an objection.

Had a promissory note been given by the defendant for payment of the amount due at the end of two years, that clearly would have taken the case out of s. 30, and here we have a specific agreement for good consideration on both sides, which has the same effect.

If agreements such as these are virtually to be disregarded, the Rent Law would indeed be made a means of the grossest fraud and injustice.

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The case will be accordingly remanded to the first Court for re-trial on the merits. And as the defendant has set up the plea of limitation in fraud of his own arrangement, he must pay the costs of all the proceedings as far as they have gone.

The costs of the new trial will, of course, be in the discretion of the Subordinate Judge.

Case remanded.

Before Mr. Justice Tottenham and Mr. Justice Bose.

1882 *June* 30.

NIHAL CHAND, *alias* CHUTTO LAL, AND OTHERS (DECREE-HOLDERS) *v.* RAMESHARI DASSEE (JUDGMENT-DEBTOR).*

Execution of Decree—Stay of Execution—Appeal from Order—Civil Procedure Code (Act X of 1877), *ss.* 243, 244, 588.

A decree-holder having attached the property of his judgment-debtor in execution, the latter applied for a stay of execution until the decision of a pending suit brought by him against the judgment-creditor. The Court allowed the application, continuing the attachment on the property, and struck the execution-case off the file. The decree-holder applied to the High Court.

Held, that no appeal lay.

THE facts of this case are fully set out in the judgment of the Court.

Baboo *Tarruck Nath Sen* for the appellants.

Baboo *Bama Churn Banerjee* for the respondent.

The following judgment of the Court (TOTTENHAM and BOSE, JJ.) was delivered by

TOTTENHAM, J.—The order against which this appeal has been preferred purports to have been passed under s. 243 of the Code of Civil Procedure, on the application of the judgment-debtor, on the ground that the judgment-debtor had brought a suit against the present decree-holders and others. The Court, in its discretion, stayed the execution of the present

* Appeal from Original Order, No. 45 of 1882, against the order of Baboo P. N. Banerjee, Officiating Subordinate Judge of Burdwan, dated the 16th January 1882.

appellants' decree pending the decision of the regular suit brought by the judgment-debtor. It ordered that the attached property should remain under attachment, but proceeded to strike the execution-case off its file.

It appears to us that the appellants have no right of appeal to this Court in this matter. They contend that it is an order determining a question between themselves and the judgment-debtor under s. 244, and that, that being so, the order amounts to a decree within the meaning of s. 2.

We think that there are two reasons against this contention being allowed. First of all we think that an order staying execution under s. 243 is not one which comes within the purview of s. 244; and secondly, if it could be said to come within the purview of s. 244, we do not think that this order amounts to a decree as defined by s. 2, as it is not an adjudication of any right claimed, nor does it appear to us to be a determination of any question mentioned in s. 244. It seems to us that the Court below has not finally determined any question as between the parties; it has simply postponed the determination of a matter before it. It is quite clear that, unless this order amounts to a decree, there is no appeal against it; for it is not one of those mentioned in s. 588, against which an appeal is allowed as against an order; and we being of opinion that it is not a decree, we are compelled to dismiss the appeal with costs.

Appeal dismissed.

CRIMINAL REFERENCE.

Before Mr. Justice Maclean and Mr. Justice Macpherson.

TAMIZ MANDAL *v.* UMID KARIGAR.*

1882
July 26.

Security for Good Behaviour—Code of Criminal Procedure (Act X of 1872), *ss.* 504, 505.

An accused person was convicted of theft and sentenced to two years' rigorous imprisonment, and was further ordered to enter into his own recognizances for Rs. 50 and find two sureties, each for a like sum, for his good

* Criminal Reference, No. 149 of 1882, from the order made by W. V. G Tayler, Esq., Magistrate of Nuddea, dated the 20th July 1882.

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behaviour for one year after the term of his imprisonment had expired; in default to suffer rigorous imprisonment for one year.

Held, that the latter part of the order was bad, and that the Magistrate should have proceeded under the provisions of s. 504, cl. 2, of the Code of Criminal Procedure.

The *Empress* v. *Partab* (1) followed.

THIS was a criminal reference made by the Magistrate of Nuddea, under s. 296 of the Code of Criminal Procedure (Act X of 1872). The terms of the reference were as follows:—"Umid Karigar was convicted by the Assistant Magistrate of Kooshtea, under s. 380, Indian Penal Code, and was ordered to be rigorously imprisoned for two years, to enter into his own recognizances in Rs. 50, and to find two sureties, each in a like sum, to be of good behaviour for one year after the term of his imprisonment had expired. In default, to suffer rigorous imprisonment for another year. The order for security and for a further term of one year's rigorous imprisonment failing security does not appear to be legal. The Assistant Magistrate, on being asked to report why this part of the sentence should not be quashed, stated that he was guided by the case of *The Empress* v. *Partab* (1); but I am still of opinion that it is illegal to call

(1) I. L. R., 1 All., 666. In this case Spankie, J., said:—"In making an order for security for good behaviour, I presume that the Magistrate holds the powers of a first class Magistrate, and that he was acting under s. 505 of the Code of Criminal Procedure. I have some doubt whether the Magistrate had adduced before him such *evidence as to general character* as to justify his dealing with the accused for the offence of which he found he was guilty, and in the record of the trial I find no evidence from which it could be gathered that the accused was by repute a receiver of stolen property. But the prisoner certainly allowed that he had been punished twice for theft, and here he was again tried and found guilty of receiving stolen property. I am therefore unwilling to disturb the order. But the order should be no part of the sentence for the offence of which accused was convicted. There should have been a proceeding drawn out representing that the Magistrate, from the evidence as to general character adduced before him in this case, was satisfied that Partab was by repute an offender within the terms of s. 505 of the Criminal Procedure Code, and therefore security would be required from him. But as he had been sentenced to two years' rigorous imprisonment, which term has not expired, an order should have been recorded to the effect that, on the expiration of the term, the prisoner should be brought up for the purpose of being bound (cl. 2, s. 504)."

upon an accused person to find security for future good behaviour in addition to a sentence passed upon him for a specific offence, and this view appears to be concurred in by the Sessions Judge, who has lately in another case reversed a similar sentence. This portion of the sentence should, therefore, I think, be quashed."

No one appeared to argue the case.

The judgment of the Court (MACLEAN and MACPHERSON, JJ.) was delivered by

MACLEAN, J.—It would have been better had the Assistant Magistrate followed the course pointed out by the Presiding Judge in the case of *The Empress* v. *Partab* (1) as the proper course to be adopted.

We direct that the order passed under s. 505 of the Criminal Procedure Code be set aside, and leave it to the Assistant Magistrate to follow the course prescribed in s. 504, cl. 2, if he thinks proper.

APPELLATE CIVIL.

Before Mr. Justice McDonell and Mr. Justice Field.

DINOBUNDHOO PAL (AUCTION-PURCHASER) *v.* SHOSHEE MOHUN PAL AND OTHERS (DECREE-HOLDERS).*

1882 June 14.

Insolvency—Execution of Decree—Decree against Insolvent—Official Assignee—Purchaser at Execution-Sale—Setting aside Sale—Code of Civil Procedure (Act X of 1877), s. 313.

Where, in execution of a decree passed against a person who had previously been adjudicated an insolvent, portions of his property (then vested in the Official Assignee) are attached and sold, the purchaser is entitled to have the sale set aside under s. 313 of the Code of Civil Procedure, notwithstanding that the Official Assignee acquiesces in the sale, and is content to receive the sale-proceeds.

THE facts of this case are fully set forth in the judgment of the Court. The auction-purchaser appealed against the order

* Appeal from Original Order, No. 21 of 1882, against the order of Baboo Gunga Churn Sircar, Subordinate Judge of Dacca, dated the 10th of December 1881.

(1) See *ante*, p. 216.

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of the Subordinate Judge, on the ground that he should have found the judgment-debtor had no salable interest in the property at the time of the sale, and that he was wrong in taking into account the conduct of the Official Assignee subsequent to the sale.

Baboo *Chunder Madhub Ghose* for the appellant.

Baboo *Bycunt Nath Dass* for the respondents.

The judgment of the Court (McDONELL and FIELD, JJ.) was delivered by

FIELD, J.—In this case the appellant before us was the purchaser of a property sold at an execution-sale, and he applied to the Court below, in accordance with the provisions of s. 313 of the Code of Civil Procedure, to have the sale set aside, on the ground that the person whose property purported to be sold had no salable interest therein. The facts of the case are briefly as follows: The judgment-debtor, under the decree in execution of which the property was sold, was adjudicated an insolvent by the High Court on the 19th January 1881. The decree was made in February 1881. The attachment in execution of the decree was in June 1881; and the sale was in August 1881. From this it appears that before the dates on which the decree was made, the attachment was made, and the sale was made, the judgment-debtor had been adjudicated an insolvent. Now the effect of that adjudication was, that all the property of the judgment-debtor vested in the Official Assignee. Section 7 of the Act, to consolidate and amend the laws relating to Insolvent-Debtors in India, 11 and 12 Vict., c. 21, provides as follows (omitting the parts not essential to the present question): "And be it enacted that it shall be lawful for the said Court to order that all the real and personal estate and effects of such petitioner, except the wearing apparel, &c., do vest in the Official Assignee for the time being of the said Court, and such order shall be entered on record in the said Court, and such notice thereof shall be published as the said Court shall direct; and such order, when so made, shall, by virtue of this Act, relate back to, and take effect from, the

filing of the said petition, and shall instantly, and without any conveyance or assignment, vest all the real and personal estate, effects and debts as aforesaid in the said Official Assignee, who shall have full powers for the recovery thereof, and shall hold and stand possessed of the same for the purposes and in manner hereinafter mentioned." Now we think that the effect of these provisions was, that this particular property vested in the Official Assignee from the 19th January 1881, and this being so, we are of opinion that the judgment-debtor had no salable interest in the property at the time when the attachment and the sale were made. Section 266 of the Code of Civil Procedure describes the property which is liable to attachment and sale in execution of a decree, and concludes thus:—"All other salable property, moveable or immoveable, belonging to the judgment-debtor, or over which, or the profits of which, he has a disposing power, which he may exercise for his own benefit." We think that, at the time of the attachment and sale, this particular property could not be said to have belonged to the judgment-debtor; nor could it be said that he had over that property or the profits thereof any disposing power which he could exercise for his own benefit. But it is contended that although the judgment-debtor may have had no salable interest in the property at the time of the attachment and sale, yet that, inasmuch as the Official Assignee afterwards consented to receive the money for which the property had been sold, he by that act confirmed and ratified the sale. This is the view which has been taken by the Subordinate Judge, who says: "It is true, as appears from certain documents filed on the part of the Official Assignee, that, before the property was attached and sold in this execution-case, all the properties belonging to the judgment-debtor, excepting certain moveable articles, had been vested in the Official Assignee by a vesting order passed by the Court for the Relief of the Insolvent-Debtors at Calcutta, still, as the Official Assignee, by his letter dated the 17th September 1881, and subsequently by his pleader, has applied only for the assets realized by the aforesaid sale and not taken any objection to the sale, I am of opinion that the sale should not be set aside but affirmed, and the entire amount realized in this

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case be remitted to the Official Assignee after necessary deductions." Now the assent of the Official Assignee can be put no higher than a conveyance by him to the appellant. We think that, as the judgment-debtor had no salable interest in the property, the appellant, the purchaser, could not obtain any title to the property by virtue of the execution-sale. If, in consequence of the assent of the Official Assignee and his subsequent ratification of the sale, the appellant would have a good title in so far that the Official Assignee might be afterwards estopped from disputing that title, it is clear that this title would be acquired not by reason of the sale, but by estoppel as against the Official Assignee; and we think that the purchaser is entitled to exercise his option as to whether he will accept the title which the Official Assignee can give him, is entitled to say, if he chooses, that he declines to take a title which, notwithstanding the Official Assignee's assent, might afterwards be called in question, on the ground that the Official Assignee had no power to allow the sale to stand; or had, by doing so, obtained less than the market-value of the property. The real question which we have to decide is, whether, within the terms of s. 313 of the Code of Civil Procedure, the person whose property purported to be sold had any salable interest therein,—that is, at the time of sale; and we think that, in consequence of the vesting order, the judgment-debtor had, at the time of the sale, no salable interest in this property; and therefore, under the provisions of this section, the purchaser is entitled to have the sale set aside. We must, therefore, reverse the order of the Subordinate Judge, and decree this appeal with costs. The purchase-money will be refunded to the purchaser. The costs will be paid by the decree-holder We allow no costs against the Official Assignee.

Appeal allowed.

CRIMINAL MOTION.

Before Mr. Justice McDonell and Mr. Justice O'Kinealy.

IN THE MATTER OF THE PETITION OF SREENATH BANERJEE AND ANOTHER.

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Aug. 7.

THE EMPRESS *v.* SREENATH BANERJEE AND ANOTHER.

Wrongful Confinement—Penal Code (Act XLV of 1860), *s.* 346.

In an order to render person liable under s. 346 of the Penal Code, it must be shown that the wrongful confinement was of such a nature as to indicate an intention that the person confined should not be discovered.

ON the 17th of February a Hindu woman went to the Court of the Magistrate of the 24-Parganas to complain of having been ill-treated and tortured by certain persons, relatives of the petitioners. The hearing of her complaint was not finished on the 17th, and she was told by her pleader to go away and come back the next day. The remaining facts are thus told by the Judge of the 24-Parganas in his judgment:—"As she was departing, she says she was accosted by the appellants, Gangadhar Dhali and Sreenath, who contrived to put her into a carriage, and drove her away, taking her to various places, at the time strange and unknown to her, at one or other of which she was kept, until a stir having arisen in the meantime on account of her disappearance after having had such a complaint recorded, she was brought back by the present appellants and produced by them before another pleader of the Magistrate's Court, in whose premises she remained till next day, the 9th March, when she was made over to the Police. It is for this abduction, and for this keeping the woman away from Court and from prosecuting her case there, that the present appellants have been convicted." The Deputy Magistrate convicted the accused under ss. 201 and 346, but passed sentence under the latter section only. On appeal, the Sessions Judge quashed the conviction under s. 201, but affirmed the conviction

* Criminal Motion, No. 205 of 1882, against the order of J. P. Grant, Esq., Sessions Judge of the 24-Parganas, dated the 29th June 1882.

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and sentence under s. 346. It was objected before the Judge that, "granting the truth of the woman's story as to her having been taken here and there, such treatment, she having been left admittedly to her own desires at each place of so-called confinement, and at liberty to go whither she pleased, and to invoke the assistance of the Police, is not confinement in law." But the Judge, in consideration of the timid and submissive natures of the lower class women of the country, when brought into contact with influential middle class men and Brahmins, and of the fact that the woman was taken away to strange places, miles from her home, overruled the objection. The petitioners then moved the High Court to set aside the order of the Sessions Judge and have the conviction quashed.

Baboo *Umbica Churn Bose* for the petitioners.

Baboo *Ram Chandra Mitter* for the Crown.

The judgment of the Court (McDONELL and O'KINEALY, JJ.) was delivered By

McDONELL, J.—In this case the prisoners were convicted of offences under ss. 201 and 346 of the Penal Code. On appeal the Sessions Judge properly acquitted them of any offence under s. 201; but upheld the conviction under the latter section. We are of opinion that the conviction cannot be sustained. To render a person liable under s. 346, it must be shown that the wrongful confinement was of such a nature as to indicate an intention that the person confined should not be discovered. In the present case it is clear that the element is wanting.

Again it appears to us that the complainant was not at all in wrongful confinement. The Judge himself says that she was induced, not forced; and that her confinement was not actual, but, as he calls it, potential. This is not sufficient. We therefore set aside the conviction and sentence; and acquitting the prisoners direct their release.

Conviction quashed.

Before Mr. Justice Wilson, Mr. Justice Maclean, and Mr. Justice Macpherson.

IN THE MATTER OF THE PETITION OF HENRY KYTE.*

THE CROWN *v.* HENRY KYTE.

Excise Act (Beng. Act VII of 1878), s. 61.—Imported Liquor—Possession—Pass—Consignee—Agent.

1882 *Aug.* 1.

Certain liquors arrived in Calcutta per S.S. *Navarino*, consigned to M. & Co. at Agra, who requested *A* to pay on their behalf the duty and landing charges, and forward the goods to Agra. While on the way from the steamer to the railway station, the goods were seized as being in the possession of *A* without a pass, within the meaning of s. 61 of Beng. Act VII of 1878, and *A* was convicted and sentenced to a fine under the provisions of that Act.

Held, that the conviction was bad.

IN this case Henry Kyte was, on the 1st of December 1881, charged before the Presidency Magistrate with having in his possession, in the Strand Road, Calcutta, on the 30th of November 1881, imported liquor without a pass or license (to wit thirty cases Port and twenty cases Sherry, each one dozen), in contravention of ss. 17 and 61 of Beng. Act VII of 1878, as amended by s. 8, Beng. Act IV of 1881. The accused pleaded not guilty. The facts of the case are fully set out in the judgment of Mr. Justice Wilson and Mr. Justice Macpherson. In convicting the accused the Magistrate said:—" If the accused had a wholesale license, he would still require a pass to protect the liquor in transit. In this case he had neither a license nor a pass, and under the law he is liable to punishment, and the liquor to confiscation. Under all the circumstances of the case, however, I fine the defendant Rs. 30 (thirty) and order one-fifth of the liquor seized,—*viz.* 10 cases,—to be forfeited.

The accused now moved the High Court to quash the Magistrate's order.

Baboo *Kalichurn Banerjee* and Baboo *Umerendro Nath Chatterjee* for the petitioner.

* Criminal Motion, No. 161 of 1882, against the order of B. L. Gupta, Esq., Presidency Magistrate of Calcutta, dated the 1st December 1881.

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The following judgments were delivered:—

MACLEAN, J.—The vakil for the petitioner has failed to satisfy me that the conviction, dated 1st December 1881, is not founded upon a correct view of the law; and, under any circumstances, I object to re-opening a case after the lapse of six months from the date of the conviction.

I am not prepared to say that the petitioner was not in possession of the liquor. It had, it is admitted, been passed out to him from the Customs, and he was about to despatch it to the consignee at Agra. Neither am I satisfied that the holder of a license, not granted by the Excise authorities here, is a licensed vendor within the meaning of Beng. Act VII of 1878. In this view of the law, the petitioner, whether in possession on his own account, or for the consignee, was a person "other than a licensed vendor," and being admittedly without a pass from the Collector or other officer duly empowered in that behalf, I see no illegality in his conviction under s. 61, Beng. Act VII of 1878.

MACPHERSON, J.—I am sorry to differ, but I certainly think the conviction is bad on the ground that no offence has been committed. The facts are, that certain liquor consigned to Martinez and Co., licensed vendors at Agra, was imported in the Steamer *Navarino*. The petitioner, at the request of the consignee, cleared this liquor by paying the duty and landing charges. The Abkari authorities seized it in the Strand Road while it was being conveyed to the Howrah station for despatch to the consignee. The petitioner was convicted of having the liquor in his possession in contravention of ss. 17 and 61 of the Excise Act (Beng. Act VII of 1878). He was not himself a licensed vendor, nor had he a pass from the Collector. The question then is, was the liquor in his possession within the meaning of those sections?

Putting a reasonable construction on the word 'possession,' I hold that it was *not*. There is certainly a distinction between possession and a bare temporary custody or charge on behalf of another person. The liquor belonged to a licensed vendor, and was in course of transit to him. It would be a very strained construction of the sections to say that it was in the

possession of the petitioner, who had merely done what was necessary to clear and forward the goods to their proper destination. If it was in his possession, it was equally in the possession of the cartmen who were carrying it. I think it makes no difference, so far as the petitioner is concerned, that the consignee was a licensed vendor not in Bengal, but in the Upper Provinces. If this conviction is right, then *A*, who had imported liquor for his own consumption and use, would be guilty of no offence once the liquor had come into his actual possession; but *B*, who acting for *A* had cleared the liquor and was conveying it from the Custom-house to *A's* house, would be guilty of an offence under s. 61, because *B* was in possession of it, and the possession was not for his private use and consumption. The Courts must certainly, before convicting, enquire into the *purpose* of the possession, and I think they must also enquire into the *nature*.

It may be noted that, in this case, though the usual notice was given to the Government Solicitor, no one has appeared for the Government to support the conviction; and though the Presidency Magistrate has, in two subsequent cases, come to an exactly contrary conclusion on precisely the same facts, the Excise authorities have accepted the decisions. Apart from this, however, I consider the conviction bad, and would set it aside.

As to the delay in making the application, this has been sufficiently accounted for. The delay might have been some ground for refusing the rule. It is no ground for rejecting the application when the rule has been granted.

The Judges having disagreed, the proceedings were laid before Mr. Justice Wilson, who delivered the following judgment:—

WILSON, J.—I agree on the whole with Macpherson, J., that this conviction was wrong.

We must take the facts, I think, to be these, and these only, that certain liquors arrived by the S.S. *Navarino* for Martinez & Co., licensed dealers of Agra, in the North-Western Provinces; that the accused was requested by them to pay, on their behalf, the duty and the landing charges, and to forward the liquor to Agra. The liquor was seized in Calcutta as

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being in the possession of the accused without a pass, within the meaning of s. 61, Beng. Act VII of 1878.

I do not think we can support this conviction unless we are prepared to lay down broadly that anybody who has anything to do with the transit of liquor is within the section. If the accused was within the section, I do not see why the ship-owners, if they landed the goods, were not equally so. I do not see how the Railway Company, if they had carried the goods, could have escaped the necessity of obtaining a pass, and perhaps a pass for each District of Bengal through which they carried them.

As to the delay that has occurred,—taking into consideration the fact, that the Magistrate himself has since disapproved of the conviction, the efforts which the accused has made in other quarters to reverse or nullify it, and that no objection is raised on the part of the Crown,—I think we may properly set aside the conviction and direct the return of the fine and the release of the goods declared to be forfeited.

APPELLATE CIVIL.

Before Mr. Justice McDonell and Mr. Justice Field.

IN THE MATTER OF THE PETITION OF HEMLOTA DABEE.*

1882 *July 3.*

Will—Probate—Execution—Witnesses—Succession Act (X of 1865), s. 50.

Where the testator does not himself sign the will, but some other person signs it in his presence and by his direction, then, besides this other person, there must be two witnesses who must sign the will in the presence of the testator.

In the goods of Roymoney Dassee (1) and *Hurro Sundari Dabia* v. *Chunder Kant Bhattacharjee* (2) cited.

THIS was an application under Act V of 1881 for probate of the will of one Girish Chunder Banerji, who died on the

* Appeal from Original Decree, No. 253 of 1881, against the order of J Whitmore, Esq., Officiating Judge of Nudden, dated the 22nd July 1881.

(1) I. L. R., 1 Calc., 150. (2) I. L. R., 6 Calc., 17.

2nd of April 1879. The applicant was Hemlota Dabee, widow of the testator's younger brother. It appeared from the evidence that the will had been written by the Magistrate's clerk; that seven witnesses then signed the will; that the testator and the witnesses then went to the Sub-Registrar's office; that the Sub-Registrar then requested the testator to sign, but he said "I am blind." Then one of the witnesses, Chunder Coomar Chatterji, signed the testator's name at his request in the following manner: "*Girish Chunder Banerji*, by the pen of *Chunder Coomâr Chatterji*, of Amelia." And then wrote under this signature, "Identified by *Chunder Coomar Chatterji*, Local Fund Clerk, Ranaghat Subdivisional Office. *Chunder Coomar Chatterji*, Local Fund Clerk, Ranaghat." Then follows the signature of the Sub-Registrar.

The District Judge refused probate, on the ground that the witnesses had signed before the testator's signature was affixed at his request. The applicant moved for review of judgment, but the motion was refused, the Judge saying:—"As regards the possibility of proving the will by means of the method suggested in the somewhat similar case of *Hurro Sundari Dabia* v. *Chunder Kant Bhuttacharjee* (1), there is this difficulty. In the present case there is no one on the back of the will to second the Sub-Registrar's possible testimony. Chunder Coomar Chatterji, no doubt, identifies the testator; but as he is the very man who signed for the testator, it cannot be said that he saw 'some other person' sign the will in the presence and by the direction of the testator, or received from the testator a personal acknowledgment of the signature of such other person. Section 50 would not, I think, be satisfied if there were only two attesting witnesses, and one of them signed for the testator; and although, perhaps in a strict grammatical sense, it may be said that 'some other' means some other than the testator, and not 'some other than the attesting witness' also, I do not think that that is the natural and proper interpretation of the third rule of the section. The present is a hard case, but I do not see any way of reversing my order." The applicant appealed to the High Court.

(1) I. L. R., 6 Calc., 17.

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Baboo *Surendro Nath Motilall* for the appellant.

The judgment of the Court (McDONELL and FIELD, JJ.) was delivered by

FIELD, J.—This is an appeal against an order of the Judge of Nuddea refusing to grant probate of a will. The ground on which the Judge refused to grant probate is, that the witnesses signed before the testator's signature was affixed at his request. It appears that the witnesses first signed the will, which was then taken to the Sub-Registrar; and before the Sub-Registrar, the testator Girish Chunder requested Chunder Coomar Chatterji to sign for him, and Chunder Coomar Chatterji wrote his name for him accordingly at his request.

It is now contended before us, on the authority of the case of *Roymoney Dassee* (1) and of *Hurro Sundari Dabia* v. *Chunder Kant Bhuttacharjee* (2), that there is in this case a sufficient admission of the signature of the testator, because there is upon the will an endorsement that the executor admitted the execution. Now this endorsement is signed "Girish Chunder Banerji, by the pen of Chunder Coomar Chatterji." Then come the words: "Identified by Chunder Coomar Chatterji, Local Fund Clerk, Ranaghat Subdivisional Office." Then come the names of two witnesses, Chunder Coomar Chatterji and the Sub-Registrar. Now it is clear that the signature to the admission was made by Chunder Coomar Chatterji writing the name of Girish Chunder Banerjee at the request of the latter; and this being so, there is, besides Chunder Coomar Chatterji, only one witness, *viz.* the Sub-Registrar. Section 50 of the Indian Succession Act, cl. 3, is as follows:—"The will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the will, or have seen some other person sign the will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses must sign the will in the presence of the testator." Now it is quite clear from this language that when

(1) I. L. R., 1 Calc., 150. (2) I. L. R., 6 Calc., 17.

the testator himself signs the will, two witnesses are necessary, who must have seen the testator sign, and who afterwards must sign in the presence of the testator. When the testator does not himself sign, but some other person signs in his presence and by his direction, then, besides this other person who has so signed at the request of the testator, there must be two witnesses. In other words, when the testator does not himself sign, but gets some one else to sign for him, there must be three persons in addition to and besides the testator himself. Now in the present case it is quite clear, that the signature to the admission was made by Chunder Coomar Chatterji at the request of the testator, and there is only one witness, *viz.* the Sub-Registrar,—that is, besides the testator there are only two persons, and not three. This being so, it appears to us that it was the clear intention of the Legislature that the person who signed for the testator at his request could not be one of the two persons who witnessed the admission of the execution itself. We may remark that, in the first of the above cases, *viz.*, that of *Roymoney Dassee* (1), the admission before the Registrar was signed by the executrix Roymoney Dassee by the pen of Jadub Chunder Sen, and there were besides two witnesses, *viz.* Jogendro Nath Sen and C. M. Chatterji, Registrar,—that is, there were three persons besides the testator. The facts of the second case in this respect do not appear from the report.

We think, therefore, that the decision of the learned Judge in the Court below is correct, and that this appeal must be dismissed without costs, as no one appears on the other side.

Appeal dismissed.

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(1) I. L. R., 1 Calc., 150.

Before Mr Justice McDonell and Mr. Justice Field.

1882
July 4

GOPAL CHUNDER MITTER (PLAINTIFF) *v.* MOHESH CHUNDER BORAL AND OTHERS (DEFENDANTS)

Suit for Possession—Civil Procedure Code (Act VIII of 1859), s. 246—Limitation Act (XV of 1877), sched ii, art. 11.

Where, in consequence of an adverse order passed under the provisions of Act VIII of 1859, s. 246, a suit is [since the Limitation Act (XV of 1877) came into force] instituted to establish the plaintiff's right to certain property and for possession, such suit is not governed by the provisions of art. 11, sched. ii of Act XV of 1877, but by the general limitation of twelve years.

Koylash Chunder Paul Chowdhry v. *Preonath Roy Chowdhry* (1), *Matonginy Dassee* v. *Chowdhry Junmunjoy Mullick* (2), *Joyram Loot* v. *Panuram Dhoba* (3), and *Raj Chunder Chatterjee* v. *Shama Churn Garai* (4) cited.

THE judgment of the Court of first instance in this case was as follows:—"This is a suit to establish the plaintiff's right to certain property and to obtain possession thereof jointly with the defendant No. 2. The property was attached in execution of a decree against the defendant No. 3, and the plaintiff preferred a claim under s. 246 of Act VIII of 1859, which was disallowed on the 7th of September 1876. The limitation law which is applicable to this case is Act XV of 1877. The suit is one to establish the plaintiff's right to certain property and to recover possession thereof, not to set aside a summary order. It has been held that, for such a suit, the period of limitation is twelve years in cases in which Act IX of 1871 applies—*Koylash Chunder Paul Chowdhry* v. *Preonath Roy Chowdhry* (1). But under cl. 11, sched. ii of Act XV of 1877 the period is only one year. Before Act IX of 1871 came into operation,

Appeal from Appellate Decree, No. 317 of 1881, against the decree of J. F. Browne, Esq., Officiating Judge of the 24-Parganas, dated the 15th December 1880, affirming the decree of Baboo Jogesh Chunder Mittra, Munsif of Alipore, dated the 23rd January 1880.

(1) I. L. R., 4 Calc., 610; S. C., 3 C. L. R., 25.
(2) 25 W. R., 513.
(3) 8 C. L. R., 54.
(4) 10 C. L. R., 435.

the period was only one year by reason of the last twelve words of s. 246 of Act VIII of 1859. The cases of *Brijo Kishore Nag* v. *Ram Dyal Bhudra* (1) and *Kaminee Debia* v. *Issur Chunder Roy* (2) support that view. Be that as it may, the period of limitation prescribed by Act XV of 1877 being shorter than the period of limitation prescribed by Act IX of 1871, this suit, if instituted within two years from the 1st of October 1877, would, under s. 2 of Act XV of 1877, have been saved from limitation. But I find that this suit was instituted on the 9th of October 1879; it is therefore barred by limitation. The suit is accordingly dismissed with costs." The plaintiff appealed to the District Judge, who dismissed the appeal with costs, saying merely that it seemed quite clear that the suit was barred by limitation.

The plaintiff appealed to the High Court, on the grounds: (i) "that art. 2 of the second schedule of Act XV of 1877 cannot be applicable to the present case, as in the present case no order has been passed against the plaintiff under s. 280, 281, 282, or 355 of Act X of 1877; (ii) that the Courts below ought to have construed the Limitation Act most strictly, and as such ought to have held that the Act in question makes no provision for a regular suit brought by a party defeated in a claim under s. 246 of Act VIII of 1859. There is no authority for substituting the section of the old for those of the new Civil Procedure Code in the schedules to Act XV of 1877."

Baboo *Pran Nath Pundit* for the appellant.

Baboo *Byddo Nath Dutt* for the respondents.

The judgment of the Court (McDONELL and FIELD, JJ.) was delivered by

FIELD, J.—The property which forms the subject of this suit was attached in execution of a decree against the defendant No. 3. The plaintiff preferred a claim under s. 246 of Act VIII of 1859 in respect of this property. This claim was disallowed on the 7th of September 1876. The plaintiff now seeks

(1) 21 W. R., 133. (2) 22 W. R., 39.

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to establish his right to, and obtain possession of, the property which formed the subject of that claim. The present suit was instituted on the 9th of October 1879, that is more than three years after the order disallowing the claim, which order was made under s. 246 of Act VIII of 1859.

The Munsif was of opinion that the limitation law applicable to this case is Act XV of 1877, and he refers to art. 11 of sched. ii of that Act. Applying that article, he was of opinion that this suit ought to have been brought within one year from the 7th of September 1876, and that, having been brought more than a year after the date of the order disallowing the claim, it was barred by limitation under the article just mentioned.

It is now contended before us in appeal that art. 11 cannot be read as applicable to s. 246 of Act VIII of 1859. Article 11 is as follows:—"By a person against whom an order is passed under s. 280, 281, 282, or 335 of the Code of Civil Procedure, &c." The Code of Civil Procedure here referred to was the Code which was in force when Act XV of 1877 was passed, that is Act X of 1877. Section 3 of Act X of 1877 provides as follows:—"When in any Act, Regulation, or Notification passed or issued prior to the day on which this Code comes into force, reference is made to Act VIII of 1859, Act XXIII of 1861, or the Code of Civil Procedure, or to any other Act hereby repealed, such reference shall, so far as may be practicable, be read as applying to this Code or the corresponding part thereof." There is, however, no provision that when, in any Act passed after the passing of Act X of 1877, reference is made to Act X of 1877, or the Code of Civil Procedure, that reference shall be read as applying to the old Code, Act VIII of 1859, or the corresponding part thereof; and in order to make art. 11 of the Limitation Act applicable to the present case, we would have to import into the law such a provision as that which has been just mentioned, and which has not been specifically made by any Act of the Legislature. We think that we cannot import a provision of this nature, more especially in construing the Limitation Act, to which the rule of strict construction is applicable according to

the practice of the Courts. The result is, that art. 11 of the present Limitation Act is not applicable to the present case.

Then arises the question, what period of limitation is applicable? It has been decided in the case of *Koylash Chunder Paul Chowdhry* v. *Preonath Roy Chowdhry* (1), that, in consequence of the repeal of the last twelve words of s. 246 of Act VIII of 1859 by Act IX of 1871, the period of limitation applicable to a suit such as that which the plaintiff has here brought is twelve years. The decision in that case has been followed in a number of cases decided by other Benches of this Court. See *Matonginy Dassee* v. *Chowdhry Junmunjoy Mullick* (2), *Joy Ram Loot* v. *Paniram Dhoba* (3), and *Raj Chunder Chatterjee* v. *Shama Churn Garai* (4). It has been contended before us by the vakil for the respondents that these decisions are not correct, and that, upon the true construction of the law, the period of limitation is one year; and that it has been so decided by the Bombay High Court and the Madras High Court (5). Having regard to the fact that this question was not raised in the Courts below, that it was there assumed that, unless art. 11 of the second schedule of Act XV of 1877 is applicable, the period of twelve years would apply, which is in accordance with several decisions of this Court, and that no cross-objection has been taken on appeal to this Court, we think it unnecessary to enter into this question upon the present occasion. We think, therefore, that this appeal must be decreed with costs, and the case must be remanded for trial on the merits.

Case remanded.

(1) I. L. R., 4 Calc., 610; S. C., 3 C. L. R., 25.

(2) 25 W. R., 513.

(3) 8 C. L. R., 54.

(4) 10 C. L. R., 435.

(5) See *Krishnaji Vithal* v. *Bhaskar Rangnath* (I. L. R., 4 Bom. 611); *Venkapa* v. *Cheubasapa* (I. L. R., 4 Bom., 21); *Jetti* v. *Sayad Hussein* (I. L. R, 4 Bom., 23).

Before Mr. Justice O'Kinealy and Mr. Justice Bose.

1882
June 13.

BHUGWAN ACHARJEE AND OTHERS (DEFENDANTS) *v.* GOBIND SAHOO (PLAINTIFF).*

Mortgagor and Mortgagee—Foreclosure—Suit for Possession—Covenant to Pay—Conditional Sale—Damages, Measure of—Costs.

Two out of several co-sharers mortgaged as their own, by way of conditional sale, a portion of the joint family property. The mortgagee foreclosed, and then instituted a suit for possession, which he withdrew with liberty to bring a fresh suit. He afterwards brought a suit for possession against the mortgagors and their co-sharers, on the suggestion of the mortgagors that it would be undefended. It was, however, defended by the co-sharers, and the suit was dismissed. The mortgage-deed contained no covenant to repay the money lent. In an action for damages brought by the mortgagee against his mortgagors—

Held, that the plaintiff was entitled to recover the money lent and interest, and the costs of the second suit.

THIS was a suit for damages. The plaint stated that, by a deed of conditional sale, dated the 17th of April 1869, the defendants mortgaged to the plaintiff's father certain land in consideration of a loan by the latter of Rs. 520. The defendants failed to pay off the amount due, and the plaintiff's father foreclosed. After the foreclosure the plaintiff's father died, and the plaintiff sued to obtain possession of the foreclosed lands. The defendants did not enter any appearance, but their co-sharers did, claiming the land as joint, and denying the right of the defendants to mortgage without their consent. That suit was withdrawn, with liberty to bring a fresh suit. The plaintiff then brought a second suit for possession against the defendants and their co-sharers, at the instance of the defendants, who stated they would get their co-sharers to confess judgment. They did not succeed in doing so however, and the suit was dismissed. The plaintiff then asked the defendants to come to a partition of the

* Appeal from Appellate Decree, No. 497 of 1881, against the decree of A. M. Cochran, Esq., Officiating Judge of Cuttack, dated the 27th December 1880, reversing the decree of W. Wright, Esq., Subordinate Judge of that District, dated the 30th September 1879.

lands, and hand over their shares to him; but this they neglected to do. The present suit was for damages calculated on the money advanced and interest and the costs of the abortive litigation. The deed of conditional sale contained no stipulation for the repayment of the debt.

The Court of first instance dismissed the suit, but this decision was reversed on appeal, the Judge citing *Kishen Mohun Shaha* v. *Ram Chunder Dey* (1), *Byhunt Nath Sen* v. *Goboollah Sikdar* (2), *Moonshee Syud Ameer Ali* v. *Syef Ali* (3), *Sreemutty Debia Chowdhrain* v. *Bimola Soonduree Debia* (4), and *Shaikh Eida* v. *Ram Jug Pandey* (5). The defendants appealed to the High Court, on the grounds of no cause of action, limitation, no stipulation in the kut-kobala for the return of the money, that the costs of the litigation could not be recovered, and *caveat emptor*.

Baboo *Umbica Churn Bose* for the appellants.

Baboo *Chunder Madhub Ghose* and Baboo *Obhoy Churn Bose* for the respondent.

The judgment of the Court (O'KINEALY and BOSE, JJ.) was delivered by

O'KINEALY, J.—In this suit certain property was mortgaged to the plaintiff by the defendants, under a kut-kobala, in the year 1869; and in that document the property was described as their own exclusive property which they had obtained by purchase. Subsequently the plaintiff instituted foreclosure proceedings, and issued the usual notice to the mortgagors. After the year of grace had expired, he sued for the mortgaged property; but certain persons intervened, and he withdrew the suit with sanction to bring a new case. From the evidence on the record, which from the observations of the Judge who tried the case in the lower Court appears to have been believed by him, it appears that the mortgagors, on the representation of the

(1) 3 W. R., 28.
(2) 24 W. R., 391.
(3) 5 W. R., 289.
(4) 21 W. R., 423.
(5) 19 W. R., 289.

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mortgagee, said, that if a new suit were brought for possession of the property, they would induce the recusant members of the joint family to which they belonged to confess judgment. This suit was accordingly brought, and those members of the family, instead of confessing judgment, opposed the claim; and the suit was dismissed both in regard to the entire property and also in regard to the share of the mortgagors. Failing thus to follow the property, the plaintiff now sues for the return of the money which his father had lent, and for the costs in the suit which was dismissed. The general rule is laid down in Macpherson on Mortgages at page 233:—"Ordinarily the mortgagee cannot sue for the recovery of the money lent by him instead of for foreclosure and possession, except when good and sufficient cause is shown for his adopting such a course. And only something which, without any blame on his part, renders it impossible for the mortgagee to obtain possession will be considered to be good and sufficient cause."

We concur with the lower Court in holding that the mortgagee is entitled to obtain his money.

Another point for consideration is, whether he is entitled to obtain the costs of the suit. It was decided, so long back as 1853, by the Sadr Dewany, where, in a foreclosure suit by a mortgagee, the suit is dismissed and he is made to pay the costs of the intervenor, that in a fresh suit he is entitled to those costs from the mortgagor and to his own costs in the suit. In the present case not only was the suit brought for the possession of the property as mortgagee, but in addition it is clear that it was brought under the advice of the mortgagors themselves. We think, therefore, that the mortgagee is entitled to obtain the costs in that suit incurred by him and the costs he paid to the intervenor.

The appeal is dismissed with costs.

Appeal dismissed.

Before Sir R. Garth, Kt., Chief Justice and Mr. Justice Mitter.

OBHOY CHURN GHOSE AND ANOTHER (DEFENDANTS) *v.* GOBIND CHUNDER DEY (PLAINTIFF).*

1882
May 22.

Hindu law—Joint family property, Suit to recover—Onus of proof—Limitation Act, 1877, *Arts* 127, 144.

The plaintiff sued for a share in certain property on the allegation that his ancestor *K* and the defendants' ancestor *R* were uterine brothers who, while they were living in commensality, purchased the property in question with their joint funds in the name of *R;* and that subsequently *K* left his home, and then his daughter, the plaintiff's mother, enjoyed the property jointly with *R* until her death, when the plaintiff succeeding to his right and interest applied to have his name registered as a joint proprietor, but his application was refused; hence this suit.

The defence was that *R* bought the property in question with his own funds after he and his brother *K* had separated; that Radha Mohun, and afterwards the defendants, had been in exclusive possession for more than twelve years; and that the suit was barred by limitation. *Held*, (reversing the judgment of FIELD, J.) that the onus was on the plaintiff to prove that the property was joint property.

Before a plaintiff can bring his case within Art. 127 of schedule II of the Limitation Act, 1877, it is incumbent on him to show that the property in which he seeks to recover a share is "joint property."

THE plaintiff's case was that his maternal grandfather Krishto Mohun Raout, and Radha Mohun Raout the maternal grandfather of the first defendant, were two uterine brothers, living together in commensality; that whilst so living they purchased with the joint funds a 6-anna share of a talook called Lobohai Runjeet in the name of the elder brother Radha Mohun; that subsequently to this purchase Krishto Mohun went away and was not heard of for a long time, and during that time his wife messed together with Radha Mohun and was in possession of a moiety of the 6-anna share of the above talook; that on her death the plaintiff's mother was in possession of the said moiety and received rent from the ryots; and that on the death of the

* Appeal under s. 15 of the Letters Patent against the decree of Mr. Justice Field, dated the 11th January 1882, in Appeal from Appellate Decree No. 2186 of 1880.

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plaintiff's mother, he succeeded to the right, title and interest of Krishto Mohun in the said moiety, and was in possession thereof, but on his applying to the revenue authorities for registration of his name under the Land Registration Act, as proprietor of the said moiety, his application was refused, and he consequently brought the present suit to establish his right to, and for possession of, the said share.

The defence was that the suit was barred by limitation; that the disputed property had not been purchased whilst the brothers were living in commensality, but was bought by Radha Mohun alone with his own money long after his separation with Krishto Mohun in food; and that neither Krishto Mohun, nor his wife, nor the plaintiff's mother, nor the plaintiff himself, were ever in possession of the share claimed.

The Munsiff found on the evidence that Radha Mohun alone, and after his death the defendants, had been in possession of the disputed share, and that the suit was barred by limitation. He therefore dismissed the suit.

The plaintiff appealed on the ground (*inter alia*) that, as it was admitted that Radha Mohun and Krishto Mohun lived in commensality, it was for the defendants to prove that the property was acquired by Radha Mohun with his own funds, and this had not been proved.

The Judge agreed with the Munsiff in his findings as to possession and limitation, and as to the ground of appeal above mentioned he found that, though it was admitted the brothers lived in commensality, yet it was not admitted that they were so living at the time the talook was acquired, and that it was consequently for the plaintiff to show that the talook was purchased when Radha Mohun and Krishto Mohun were living together, or that it was acquired with funds partly supplied by Krishto Mohun which he had not done. He therefore dismissed the appeal. The plaintiff appealed to the High Court, and the case came before FIELD, J., the material portion of whose judgment was as follows:—

"As to the view of the Judge that, although it was admitted by the defendants that the brothers were at one time joint, still it lay upon the plaintiff to prove that they were joint at the time when this property was acquired, it is to be observed that this

view is not supported by authority. The normal state of a Hindu family is that of coparceners, and it lies upon the person who alleges separation to prove it. Now here it was admitted that a coparcenary existed, and it must be presumed that this coparcenary continued until there was evidence of a separation. The burden of proof was, therefore, on the defendants to prove that there was a separation, and at a time antecedent to the acquisition of this property. Having disposed of the presumption of Hindu law in the manner just indicated, the District Judge proceeded to deal with the question of limitation. He says: 'As the defendants have succeeded in proving to the Munsiff's satisfaction and to mine that they have been in exclusive possession of the talook for more than twelve years, it is quite clear that the plaintiff cannot succeed in this suit.' This is not correct as the law now stands. If the property was joint property twelve years, exclusive possession alone will not have the effect of barring the present claim. Article 127 of sch. II of the Limitation Act provides that in a suit by a person excluded from joint family property to enforce a right to share therein, the time from which the twelve years begin to run is when the exclusion becomes known to the plaintiff. If, therefore, this were found to be joint property, it would be necessary to enquire when the exclusion of the plaintiff, or those under whom he claims, became known to him or them. The decree of the District Judge must be set aside, and the case remanded in order that he may come to a fresh decision with reference to the observations above made."

Baboo *Aukhil Chunder Sen* for the appellants.

Baboo *Sreenath Banerjee* for the respondent.

The following judgments were delivered by the Court (GARTH, C.J., and MITTER, J.)

GARTH, C.J.—I am unable to agree in the view which the learned Judge has taken of this case.

There is no doubt, of course, that as a general principle, when a Hindu family is proved to have been joint, that state of things is presumed to continue, until the contrary is shewn. The question is, how far that principle can properly be applied in this case.

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The plaintiff sues to recover an undivided share in certain land, which is now, and has been for many years past, in the defendants' exclusive possession, and his case in this.

He says that his maternal grandfather Krishto Mohun, and the maternal grandfather of the defendant No. 1, were uterine brothers; and that whilst they were living in commensality they purchased the property in question with their joint funds in the name of Radha Mohun; that subsequently Krishto Mohun left his home, and then his daughter (the plaintiff's mother) enjoyed the property jointly with Radha Mohun till her death, when plaintiff succeeded to his right, and applied to the revenue authorities to have his name registered, but that having failed in this application, he sues to establish his right and to recover possession.

The defendants' case is that Radha Mohun bought the property himself with his own money, after he and his brother had separated; that Radha Mohun, and afterwards the defendant No. 1, under Radha Mohun's will, have been in exclusive possession; and that the plaintiff and those under whom he claims never had anything to do with it.

Both Courts have found in favor of the defendants. They say that the plaintiff has entirely failed to show that at the time when the property was purchased the two brothers, Radha Mohun and Krishto Mohun, were living in commensality, or that the property was purchased with their joint funds, or that Krishto Mohun had anything to do with it. It was purchased in Radha Mohun's name; it was left by his will to the defendant No. 1, and the defendants have been in exclusive possession of it for upwards of twelve years, so that the plaintiff is barred by limitation.

But the learned Judge of this Court has held that, as this is a suit brought by a Hindu to recover possession of joint family property, and as it is admitted that Radha Mohun and Krishto Mohun were at one time joint, the presumption is, till the contrary is shewn, that the property in suit was purchased during the time that the brothers were living joint, and that it was incumbent on the defendants to prove that the property was purchased after the separation.

He considers, moreover, that the ordinary rule of twelve years'

limitation does not apply; and that the case comes under s. 127 of the Limitation Act; so he has remanded the case for the further enquiry, at what time his exclusion from this property became known to the plaintiff.

Now it seems to me that before a Hindu plaintiff can bring his case within Article 127, he must prove that the property in which he seeks to recover a share is "*joint family property*;" and that it is not enough for him merely to call it joint family property, and to show that 30, 50 or 100 years ago his ancestors, and the defendant's ancestors, were joint; leaving the Court to presume from this, that any property of which the defendant may be possessed at the time of suit brought is joint family property.

In this case, the property in suit is found to have been *in the exclusive possession of the defendants for upwards of twelve years;* and I consider that under s. 144 they have a *primâ facie* right to that property by force of the twelve years' limitation rule against all the world. If the plaintiff wants to bring himself within Article 127, which places him in a more advantageous position than other claimants, he is bound to show that the property which he seeks to recover *was at some time joint family property*. In this he has entirely failed.

The doctrine, which the respondent's pleader has advanced, and which has apparently been acted upon by the learned Judge in this Court, appears to me a very dangerous one. If that doctrine were well founded, it would seem to follow that however long a Hindu may have been in the exclusive possession of property, movable or immovable, he would always be subject to have his title to it questioned by any distant member of his family, who could prove that at some prior period, even 100 years before, their common ancestors were members of a joint family; and not only so, but that in all such cases the onus of proving that the property was not joint would lie upon the defendant.

I should be sorry to think that this was the law. I consider that in this case these defendants having a twelve years' statutory title to the property claimed, have a *primâ facie* case of separate ownership, and that as the plaintiff has given no evidence that the property was ever joint, his suit was properly dismissed. As my brother Mitter is also of this opinion, the judgment of the Dis-

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trict Judge will, therefore, be restored, with the costs of both hearings in this Court.

MITTER, J.—I am also of the same opinion.

The plaintiff seeks to recover possession of a share in a property which the defendants claim as the exclusive property of their predecessor in title, Radha Mohun. The plaintiff is the daughter's son of Krishto Mohun, Radha Mohun's brother.

The plaintiff alleged that this property was a joint family property of Radha Mohun and Krishto Mohun. The lower Courts found that the plaintiff had utterly failed to establish that it was at one time their joint family property. They also found that the defendants and their predecessor in title have been in possession of this property for more than twelve years. Upon these findings the lower Courts dismissed the plaintiff's suit on the ground of limitation, as well as on the ground that the plaintiff's title was not made out.

On the second appeal the learned Judge in this Court held that the decisions of the lower Courts were erroneous in law. He is of opinion that the plaintiff's suit ought not to be dismissed as barred by limitation upon the finding that the defendants were in exclusive possession of the property in dispute for more than twelve years. He thinks that Article 127 of the second schedule of the Limitation Act is applicable to the facts of this case. As to the title of the plaintiff, the learned Judge is of opinion that it must be presumed in his favor, because the defendants failed to prove that the property in dispute belonged exclusively to Radha Mohun. He thinks that if two brothers are admitted or proved to have lived as members of a joint Hindu family at one time, it must be presumed that their joint status continued until the contrary was proved.

Acting upon this presumption he has come to the conclusion that at the time of the acquisition of the property in dispute Radha Mohun and Krishto Mohun were members of a joint Hindu family, because the defendants have given no evidence to shew that they had separated before that time.

Having thus arrived at the conclusion, that at the time of the acquisition of the property in dispute the brothers were joint, the learned Judge has thrown the onus of proving that it was the

exclusive property of Radha Mohun upon the defendants; because, according to another presumption of Hindu law, a property, purchased in the name of one member of a joint family, must be presumed to be the common property of the family until the contrary is shewn. As the contrary has not been shewn in this case, the learned Judge has come to the conclusion that the property in dispute belonged to the two brothers Radha Mohun and Krishto Mohun.

Now it seems to me that in this case there was no room for either of these presumptions. It was an admitted fact that at the time when the suit was brought the plaintiff and defendants were not members of a joint family; that being so, the case is brought within the ordinary rule, *viz.*, that the plaintiff must succeed on the proof of his title. He must prove that the property in dispute is his, by reason of its being a joint family property belonging to his ancestor, and the ancestor of the defendants. This view of the law is supported by the decision of the Judicial Committee in *Bannoo* v. *Kashee Ram* (1). There also it was admitted, as in this case, that when the dispute arose, the family was separate. The Judicial Committee held that in this state of things no presumption arises in favour of the plaintiff. Their Lordships say: "In the case of an ordinary Hindu family who are living together, or who have their entire property in common, the presumption is that all that any one member of the family is found in possession of belongs to the common stock. That is the ordinary presumption, and the onus of establishing the contrary is thrown on the member of the family who disputes it. Having regard, however, to the state of this family when the present dispute arose, their Lordships think that the presumption cannot be relied upon as the foundation of the plaintiff's case, and therefore, as he seeks to recover property which was in the possession of Ramdyal, and was ostensibly his own at the time of his death, it lies upon him to establish by evidence the foundation of his case, *viz.*, that the property was joint property, to which he and his brother Kashee Ram, as surviving members, were entitled."

(1) I. L. R., 3 Calc., 315.

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As regards the application of Article 127 of the Limitation Act, I fully agree with my Lord the Chief Justice, that it cannot be applied until the plaintiff proves that the subject-matter in dispute is joint family property.

In the opinion of the lower Courts the plaintiff has failed to prove that the property in dispute was at any time the joint family property of Radha Mohun and Krishto Mohun. This finding of fact must be accepted as correct in second appeal.

Appeal allowed.

Before Mr. Justice Mitter and Mr. Justice Norris.

1882 *July* 3.

MOHADEAY KOOER (PLAINTIFF) *v.* HARUK NARAIN AND OTHERS, (DEFENDANTS).*

Partition—Hindu Widow—Revenue-paying Estate—Beng. Act VIII of 1876, *s.* 10.

A Hindu widow who has succeeded to a share in a revenue-paying estate as heir to her deceased husband is not a person having a proprietary interest in an estate for the term of her life only, within the meaning of s. 10, Beng. Act VIII of 1876. Even if she were, a Civil Court would not be debarred from decreeing partition of a revenue-paying estate at her instance if a proper case for the passing of such a decree be made out by her.

Jadomoney Dabee v. *Sarodaprosono Mookerjee* (1); *Phool Chand Lall* v. *Rughoobuns Sahoy* (2); *Katama Natchiar* v. *The Rajah of Shivagunga* (3); and *Bhagbutti Dass* v. *Chowdhry Bholanath Thakoor* (4) referred to.

Principles on which Courts should order partition at the instance of a Hindu widow stated.

IN this case the plaintiff stated that she and the defendants were joint owners of a settled revenue-paying estate, her share in right of her deceased husband being 3 annas 10 gundas; that in order to remove all likelihood of future disputes she applied to the

* Appeal from Original Decree No. 102 of 1881, aginst the decree of Baboo Mohendro Nath Bose, Subordinate Judge of Tirhoot, dated the 4th of March 1881.

(1) 1 Boulnois, 120.
(2) 9 W. R., 108.
(3) 9 Moore's I. A., 539.
(4) L. R., 2 I. A., 256.

Collector for a butwara of the estate, but that the application was, on the 4th of November 1879, rejected under the provisions of s. 10 of Beng. Act VIII of 1876. It appeared that the widow's application to the Collector was opposed by three of her co-sharers, Haruk Narain Chowdhry and his two brothers, and the widow then filed the present suit on the 9th of February 1880, praying for a reversal of the Collector's order and for partition. The Subordinate Judge dismissed the suit, and delivered the following judgment :—

"The plaintiff, a Hindu widow, seeks in this suit for butwara of her share by the Collector under the law for the partition of estates. She is met by the defendant with the objection that such a partition could not be held under s. 10 of Beng. Act VIII of 1876. I am of opinion that the above section applies. It provides that 'no person having a proprietary interest in an estate for the term of his life only, shall be deemed to be a person entitled to claim partition under this Act.' Now this is the present butwara law, and if the partition were at all to be held, it must be under the provisions of this law. It is contended that a Hindu widow's estate is not that of a proprietor for life, but she holds absolutely as heir to her husband. It may be that her estate is not of a tenant for life, as understood in England, but there cannot be the least doubt that her interest is that of a proprietor for life. If such a person as a Hindu widow or other female heiress under the Hindu law is not intended by the above section, I cannot conceive what other individual could be contemplated by the legislature. I therefore hold that a Hindu widow is a person within the scope and meaning of the aforementioned section of the law. If that is so, this Court cannot direct the Collector to make a butwara in this case, for that would be directing him to commit an illegality. I accordingly dismiss the suit and charge the plaintiff with the costs of the opposing defendants with interest. The costs of the consenting defendants will be borne by themselves."

The plaintiff appealed to the High Court on the grounds (1), that the Court below was wrong in holding that a Hindu widow is a person within the scope and meaning of s. 10 of Beng. Act VIII of 1876; (2), that the Court below ought to have held that a Hindu widow, such as the plaintiff is, fully represents the estate inherited by her from her husband, and is not tenant for life; (3), that the Court below ought to have held that the plaintiff was entitled to claim partition.

Baboo *Chunder Madhab Ghose* and Baboo *Gopal Lal Mitter* for the appellant.

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Baboo *Mohesh Chunder Chowdhry* and Baboo *Pran Nath Pundit* for the respondents.

The judgment of the Court (MITTER and NORRIS, JJ.) was delivered by

MITTER, J.—This is an appeal against the decision of the Subordinate Judge of Tirhoot dismissing the (plaintiff's) appellant's suit for the partition of a revenue-paying estate, a fractional share of which is owned and held by her by right of inheritance from her husband. The defendants, 1st party, who own and hold another share of this estate, and who if they survive the (plaintiff) appellant are presumptively entitled to the share in her possession after her death, alone opposed her claim.

It appears that before this suit was instituted the (plaintiff) appellant had made an application to the Collector of the district to partition the estate under the provisions of Beng. Act VIII of 1876, but the Collector dismissed the application on the ground that the (plaintiff) appellant being in possession of a share of the estate as a Hindu widow was precluded by the 10th section of the Act from applying for the partition thereof.

The present suit was then brought, praying for the reversal of the Collector's order and for an order directing that officer to partition the estate under the provisions of Beng. Act XIII of 1876.

The lower Court framed the following issues:—

First.—"Whether under the butwara law the plaintiff is entitled to have a partition effected of her share."

Second.—"Whether the plaintiff has suffered any inconvenience in the enjoyment thereof by reason of the property being joint."

The suit has been dismissed on the first of these issues, and no evidence was taken with reference to the second issue, although we are informed that the parties were ready with their evidence in the lower Court.

The objections taken before us in appeal are, 1st, that the lower Court is in error in holding that the provisions of s. 10, Beng. Act VIII of 1876 apply to the estate of a Hindu widow; and, 2ndly, that supposing the view taken by the lower Court of the provisions of s. 10 of the Act in question is correct, a Civil Court is not precluded from decreeing partition of a revenue-

paying estate at the instance of a Hindu widow, when a proper case for passing such a decree is made out.

We are of opinion that both these objections are valid.

Section 10 of Beng. Act VIII of 1876 is to the following effect:—"Notwithstanding anything hereinbefore contained, no person having a proprietary interest in an estate for the term of his life only shall be deemed to be a person entitled to claim partition under this Act." In order to decide whether a Hindu widow's estate comes within the purview of this section, we must determine what that estate precisely is.

In *Jadomoney Dabee* v. *Sarodaprosono Mookerjee* (1), Colvile, C.J., said: "But the estate of a Hindu widow is very different from a mere life estate. The case of *Cossinauth Bysack* v. *Harro Soondery Dasi* (2), which has long given the law to this Court, and since it is a decision of the Privy Council, ought to have given, if it has not given, the law to the Courts of the East India Company, establishes that the estate of a widow is something higher than a life estate; that it entitles her to the possession of the property without restriction; and that she has a qualified power of disposition in it, the limits of which it is difficult, if not impossible exactly, to define further than by saying that the propriety of any particular exercise of that power must depend upon the circumstances in which it is made, and must be consistent with the general principles of Hindu law regarding such dispositions."

In another case, *viz.*, of *Phool Chand Lall* v. *Rughoobuns Sahoy* (3), Peacock, C.J., said: "The widow takes a widow's estate by inheritance from her husband. It is not an absolute estate for all purposes, and *it is not merely an estate for life*." Then again in *Katama Natchiar* v. *The Rajah* of *Shivagunga* (4), in which one of the questions for decision was whether a decree obtained against a Hindu widow was binding upon the heirs coming in after her, the Judicial Committee of the Privy Council observed: "For assuming her (a Hindu widow) to be entitled to the zemindari at all the whole estate would for the time be vested in her absolutely for some purposes, though in

(1) 1 Boulnois, 120, at p 129
(2) Clarke's Rules and Orders, Ap. 91.
(3) 9 W. R., 108.
(4) 9 Moore's I. A., 539.

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some respects for a qualified interest, and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance would seem to apply to the case of a Hindu widow, and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow."

It is clear from these cases (1), that the widow completely represents the estate; (2), that under certain circumstances she has the right to convey an absolute interest in it; and (3), that until her death it is impossible to ascertain who would be entitled to succeed to the estate after her. Such an estate as this cannot be merely an estate for life. The distinction between a mere life-estate and a widow's estate is explained by the Judicial Committee in *Mussamut Bhagbutti Daee* vs. *Chowdhry Bholanath Thakoor* (1). In that case one Odan Thakoor executed before his death a deed providing that after his death his property was to be enjoyed by his wife during her life time, appropriating the profits derived therefrom, and that after her death it was to devolve on his adopted son. The Judicial Committee of the Privy Council held that the widow obtained in this case an estate for life, and that the remainder was vested in the adopted son. Their Lordships observed, "if she (the widow) took the estate only of a Hindu widow, one consequence no doubt would be that she would be unable to alienate the profits, or that at all events whatever she purchased out of them would be an increment to her husband's estate, and the plaintiffs would be entitled to recover possession of all such property real and personal; but on the other hand she would have certain rights as a Hindu widow; for example she would have the right, under certain circumstances, if the estate were insufficient to defray the funeral expenses or her maintenance, to alienate it altogether. She certainly would have the power of selling her own estate; and it would further follow that Giridhari (the adopted son) would not be possessed in any sense of a vested remainder but merely a contingent one."

(1) L. R., 2 I. A., 256.

With all these decisions before the Legislature, defining what a widow's estate is, and which definition clearly shews that it is not a proprietary interest for the term of her life only, it seems to us not probable that if, by enacting s. 10 of Beng. Act VIII of 1876 they had intended to disentitle a Hindu widow from claiming partition under the aforesaid Act, they would have described her right as "a proprietary interest in an estate *for the term of her life only*."

The words "a proprietary interest in an estate for the term of one's life only" would imply an interest which, actually in the enjoyment of the owner at the time of his death, would terminate on the happening of that event, and would not pass on to his heirs, or if at that time that interest be in the hands of an alienee under an alienation made by him during his lifetime, it would cease to exist on his death. The first of these alternatives is true in the case of a Hindu widow, but not the second in all cases because, as already shewn, she has the right under certain circumstances to convey an absolute interest in the estate inherited by her.

Then again under Regulation XIX of 1814 a Hindu widow was competent to apply for partition of a revenue-paying estate. Clause 2, s. 4 of the Regulation provided that on an application by one, two, or more of the proprietors of a joint estate being made, the Collector should publish an advertisement notifying the same to all parties concerned, and specifying that he should proceed to make the division applied for in 15 days from the date of the advertisement, unless any person in possession of the estate should, before the expiration of that time, deny the right of such claimant or claimants to the share or shares so claimed by him or them. The next clause provided that in the event of any such denial not being offered to the claim for separation, the Collector should proceed to make the division applied for.

It is clear from these provisions that a Hindu widow, who represents the estate of her husband completely, was entitled under Regulation XIX of 1814 to apply for partition of a revenue-paying estate. This Regulation was repealed by Beng. Act VIII of 1876 which has now taken its place. And if it was the intention of the Legislature to take away from a Hindu widow the right of applying to the Collector for partition of a revenue-

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paying estate—a right which she undoubtedly had under the Regulation of 1814—the Legislature would have done so by a more clear provision than what is contained in s. 10 of Beng. Act VIII of 1876 which, in our opinion, applies only to the case of a simple life estate where the remainder is vested in some known person. The decision of the lower Court upon this point is not in our opinion correct.

But even if s. 10 of Beng. Act VIII of 1876 were applicable to a widow's estate, still a Civil Court would not be debarred from decreeing partition of a revenue-paying estate at the instance of a Hindu widow if a proper case for the passing of such a decree be made out by her. This is clear from the provisions of s. 29 of the Act, which says: "Subject to the provisions of s. 11, a Civil Court may at any time direct the Collector to assign to any person lands representing a specified interest in any estate, &c., &c., &c., to be held by such person as a separate estate, &c., &c., &c., provided that an application for such partition and separation shall be presented by such person as required by ss. 16, 17, 18 and 19." But a decree of this nature must be executed in the manner indicated by s. 265 of the Civil Procedure Code.

Although the right of enforcing partition is generally a common incident in a joint undivided property, yet it by no means follows that a Civil Court would be bound to decree partition at the instance of a Hindu widow without a special cause or necessity being established for a partition. The estate of a Hindu widow is peculiar; although she completely represents the estate, yet the persons who take after her do not take it *through* her, but they take it as heirs of the last male owner. There is a further peculiarity, namely that until her death it cannot be known who would succeed to the estate after her death. Under these circumstances it would be the duty of a Court of Justice to see, before decreeing partition, that the interest of the presumptive heir be not affected by such decree. From the peculiar nature of a Hindu widow's estate, we are of opinion that the above restriction should be put upon her right to enforce partition—a right which is inherent in every owner of property: See *Shama Sundari Debi* v. *Jardine Skinner* (1).

(1) 3 B. L. R., Ap. 120.

Therefore, before a decree for partition is given in a suit by a Hindu widow brought for that purpose, the Court ought to be satisfied that it is a *bonâ fide* claim arising from such necessities as render partition desirable between two joint owners, and that she would properly represent the interest of the estate including that of the person who would come in after her. It is upon the ground of her representing the next-taker after her that a decree for partition at her instance is held binding upon such next-taker. The following observations in Story's Equity Jurisprudence, Vol. I, s. 656A, lend considerable support to the views expressed above: "Doubts were formerly entertained whether in a suit in equity for a partition, brought only by or against a tenant for life of the estate, where the remainder is to persons not *in esse*, a decree could be made which would be binding upon the persons in remainder. That doubt is, however, now removed; and the decree is held binding upon them upon the ground of a virtual representation of them by the tenant for life in such cases; but if the partition is made in pursuance of an agreement between the tenant for life and the other party, under such circumstances the Court would direct it to be referred to a master to enquire and state whether it will be for the future benefit of the remainder-men that the agreement should be carried into execution without any variations, or, if with variations, what the variations ought to be."

The same duty is cast upon a Court of Justice here, namely that it should be satisfied that the decree for partition, if made, would not in any way act injuriously to the interests of the future heir.

For the foregoing reasons we are of opinion that the decision of the lower Court is erroneous. The decree of that Court is, therefore, reversed, and the case remanded for re-trial in accordance with the observations made above. The costs of the hearing before us will abide the result.

Appeal allowed.

GENERAL SECRETARIAT

Before Mr. Justice Tottenham and Mr. Justice Norris.

TIRTHANUND THAKOOR (PLAINTIFF) *v.* HERDU JHA (DEFENDANT).*

1882
June 23.

Landlord and Tenant—Enhancement—Presumption—Beng. Act VIII of 1869, ss. 3, 4.

Section 4, Beng Act VIII of 1869, entitles the holder of land for the time being, however he may have acquired it, to the benefit of the presumption prescribed in that section if he can show that there has been a continuous and uniform payment of the same rent for twenty years.

THIS was a suit to recover rent for the year 1287 M.S. at a rate which the defendant was required to pay by a notice of enhancement, dated the 6th of January 1879, and served on the defendant through the Sub-Divisional Collectorate. The plaint admitted that the defendant had previously been paying Rs. 3-4 a year as rent for 6 bighas 6 cottas of land, and the rent now demanded was one rupee per bigha. The defendant alleged that he held 8 bighas of land at a yearly rent of Rs. 3-4 only; that he had received this holding in 1273 M.S. (which commenced on the 12th of April 1865) from one Gopal Sahu, in whose family it had been from the time of the decennial settlement; that his name had been entered on the zemindars' registers; and that his rent was not liable to enhancement. It was found by the Munsiff that the defendant had purchased the interest of Gopal Sahu, but on this part of the case the Judge said: "Gopal Sahu was examined as a witness, and he says that he caused the defendant's name to be entered in lieu of his own in the zemindars' sherista, but he utters not a word, so far as I can find, about any transfer of rights by sale. On the contrary Gopal Sahu was, he tells us, only fourteen years of age when his father died, and he gave up the jote because he could not carry it on." The learned Judge then went on to say:—

There is no evidence on the record to show that a transfer of a holding under such circumstances gives the transferee any right by local custom

* Appeal from Appellate Decree No. 1773 of 1881, against the decree of F. Comley, Esq., Judge of Purnea, dated the 15th June 1881, affirming the decree of Baboo Hem Chunder Mitter, Munsiff of Acarea, dated the 2nd March 1881.

to count the previous holder's occupancy as his own. Had the question been whether Herdu Jha could add on to the time of his possession, the time during which Gopal Sahu or his father had held the jote, in order to establish an occupancy right under s 6, Beng Act VIII of 1869, it must have been answered in the negative. But the working of ss. 3 and 4 of the Act are peculiar, and if strictly read imply that, without reference to the fact of any transfer, when the rent of any land has not been changed from the time of the permanent settlement, that rent cannot be enhanced without the consent of the tenant for the time being in possession.

In the case of *Ramnath Lal Bhagat* v. *Watson* (1), Sir Barnes Peacock, observed that "sections 3 and 4 of Act X make no mention of the nature of the pottahs under which the land has been held, or of the right under which a fixed rent has been paid without alteration, but exempt from enhancement lands which have been held at fixed rents from the time of the permanent settlement under whatever circumstances the land has been so held. This is clearly shewn by section 4" (section quoted). "The presumption required to be made is not that the land has been held by the ryot and his ancestors, or by him and the persons who had power to alienate it to him, but simply that it has been held at a fixed rent. The right of exemption from enhancement is founded upon the simple fact of the land having been held at a fixed rate of rent from the time of the permanent settlement." The same principle appears to be involved in *Rajkishore Mookerjee* v. *Hurreehur Mookerjee* (2), and *Kashinath Lushkur* v. *Bamasoondures Debia* (3). The case of *Luteefoonnissa Beebee* v. *Poolin Behary Sein* (4), explains the meaning of s. 4 to be that "where at the time of the commencement of the suit land is held by a ryot, and has been held by him, or by some person through whom he claims, at the same rent for a period of twenty years next before the commencement of the suit the presumption specified in the section shall be made. In other words there must have been a holding for twenty years next before the commencement of the suit, at a rent which has not been changed during that period." The words "through whom he claims" are wide enough to cover simple transfers of holding, and were made apparently to guard against the application of the presumption to cases in which there may have been a breach in the continuity of possession. In the present instance the acquittances go back to the year 1268 M. S., which began on the 12th of April 1861, and the plaint in this suit was filed on the 14th of July 1880. The Munsiff appears to be correct in holding that the rent has been unchanged for a period of twenty years before the commence-

(1) Rev., Jud. & Police Journal, Vol. I, p 54.
(2) 10 W. R., 117.
(3) 10 W. R., 429.
(4) W. R. F. B., No 31.

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ment of this suit, and as though not without considerable hesitation and doubt I have come to the conclusion that a mere transfer of a holding with the consent of the zemindar, as in the defendant's case, is a sufficient continuity of tenancy to enable the tenant for the time being in possession to claim the benefit of s. 4 of Beng. Act VIII of 1869, I must dismiss the appeal.

The plaintiff appealed to the High Court against the learned Judge's construction of s. 4 of Beng. Act VIII of 1869.

Baboo *Taruck Nath Sen* for the appellant.

Baboo *Saligram Singh*, for the respondent.

The judgment of the Court (TOTTENHAM and NORRIS, JJ.) was delivered by

TOTTENHAM, J.—In this appeal it has been contended that the lower Appellate Court has wrongly given the defendant-respondent the benefit of the presumption prescribed in s. 4 of the Rent Act VIII of 1869, although his tenancy commenced less than twenty years before the suit was brought, and he did not, as found by the Judge, acquire the land by any transfer from the previous tenant.

The words of the section are sufficiently plain; and seem to us to entitle the holder of the land for the time being, *however he may have acquired it*, to the benefit of the presumption, if he can show that there has been a continuous and uniform payment of the same rent for 20 years. This interpretation is not inconsistent with what has been decided in this Court in previous cases, though in those cases it was not necessary to lay down more than this, that the holding of the ryot, or of some person through whom he claims, for a period of 20 years, was enough to raise the presumption.

In the present case it has been found that there was no break in the continuity of the payment of the rent alleged by the defendant, but that he, without any interruption of tenancy, was substituted by the zemindar for the previous tenant, and continued to pay the same rent.

In our opinion, therefore, the lower Court has rightly given him the benefit of the presumption, having found the necessary facts in his favor.

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The appeal is dismissed without costs, as nobody appears for respondent.

Appeal dismissed.

PRIVY COUNCIL.

HURO PERSHAD ROY (PLAINTIFF) *v.* GOPAL DAS DUTT AND OTHERS (DEFENDANTS).

P. C.*
1882
April 20.

[On appeal from the High Court at Fort William in Bengal.]

Limitation—Bengal Act VIII of 1869, *s.* 29—*Suit for arrears of rent.*

After the expiration of the period prescribed by s. 29 of the Bengal Act VIII of 1869, a plaintiff suing for arrears of rent cannot insist on the pendency of another suit, brought by him for possession of the land, as preventing limitation from running, where there has been no time during which such rent could not have been recovered if he had acted on his right of suing for it.

In *Rani Surnomoyee* v. *Shoshee Mookhee Burmonea* (1), the claimant of rent was, until the setting aside of the sale that had taken place, in the position of a person whose claim had been satisfied. The right to sue in that case had been suspended; and it was, therefore, distinguishable from the present.

The plaintiff's ancestor purchased a talook from the Government, subject to an ijara therein held by the defendants, which expired in 1866. A suit brought by the plaintiff in 1874 for possession was dismissed finally in 1876, the defendant's claim to remain in possession under another tenure being allowed. The plaintiff in 1876 sued the defendants for arrears of rent for the years 1866—1872.

Held, that the suit was barred under s 29, notwithstanding the proceedings of 1874.

APPEAL from a decree of the High Court (May 16th, 1878) affirming a decree of the Subordinate Judge of the district of the 24-Pergunnahs (20th November 1876.)

* *Present:* SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH and SIR A. HOBHOUSE.

(1) 12 Moore's I. A., 244; S. C., 2 B. L. R., P. C., 10.

1882.

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The suit out of which this appeal arose was to recover from the defendants, who held certain chakdari tenures within the plaintiff's zemindari of Kassinagar in the 24-Pergunnahs, the rent of their holdings from April 1872 to July 1876. Both the Courts in India held the claim barred by limitation under s. 29 of Act VIII of 1869, the "Landlord and Tenant Act, 1869," prescribing a three years' limitation in suits for rent.

The question raised was whether limitation had been prevented from running by the continuance of litigation between the parties.

The predecessors in estate of the respondents had formerly been proprietors of Kassinagar in which their zemindari interest was brought to sale by the Government for arrears of revenue in 1838. The Government at the sale purchased the proprietary right, and having held it khás for some years, granted portions of it in ijara to members of the family of the former proprietors. These leases expired in 1866. Meantime in 1861 the Government had sold to Tarapersad Rai, father of the present appellant Huropersad Rai, the zemindari interest in Kassinagar.

In 1866 Huropersad Rai having succeeded his father as zemindar, sued those who had been the lessees under the expired ijaras to obtain direct possession. Those tenants then alleged their right to remain in possession under certain old chakdari tenures existing within the zemindari, and held by them under their own relations from before the time of the settlement and subsequent sale, as above-mentioned, of Kassinagar. Litigation ensued, commencing in 1872, when Huropersad Rai filed his plaint for possession, contending that these tenures, of which he denied the existence, had been, if they ever existed, rendered void by the sale for arrears of revenue in 1838, and the dealing with the estate by the Government afterwards. In 1874 this suit was dismissed, and in January 1876 the High Court confirmed this decision. Huropersad Rai then brought the present suit on the 7th February 1876, to recover arrears of rent from the years 1866 to 1872 on the basis that the chakdari tenures existed.

Meantime he appealed to Her Majesty in Council against the

decision of the High Court of January 1876, but without success. In advising the dismissal of the appeal, on the 26th May 1881, their Lordships expressed their opinion that the defendants, even if not in possession under a well-proved legal title, were in possession under colour of a title which had not been avoided, though it might have been, as far back as the year 1838, and that since then time had run in their favor. It had not been shown that the Government did anything to avoid the tenures under which the defendants were in possession.

The Subordinate Judge of the 24-Pergunnahs district dismissed the suit for rent on the issue of limitation under s. 29 of Act VIII of 1869. The High Court on appeal upheld that decision. The judgment of the Court (GARTH, C.J., and McDONELL, J.) is reported in I. L. R., 3 Calc., 819.

Mr. *R. V. Doyne* appeared for the appellant.

The respondents did not appear.

For the appellant it was argued that during the continuance of the litigation of 1874, in which the present appellant, *bonâ fide* believing that the alleged chakdari tenures did not exist, had contested the tenant's right of possession, he was unable at the same time to insist on his right against them as tenants, and, therefore, the course of limitation was suspended. Reference was made to *Rani Surnomoyee* v. *Shoshee Mookhee Burmonea* (1); *Dindyal Paramanik* v. *Radhakishori Debi* (2);

(1) 12 Moore's I. A., 244; S. C., 2 B. L. R., P. C., 10. In that case an auction sale under Beng. Reg VIII of 1819 of the rights of patnidars in a patni talook by the zemindar for arrears of rent, was set aside by the Zilla Court for informality in the notices under that Regulation, and the patnidars who had been dispossessed were restored with mesne profits. The zemindar then brought a suit against the patnidars, under Act X of 1859 to recover the arrears of rent, which had accrued before and during the time they were out of possession. A decision that this suit, not having been brought within three years from the time when the rent first became due, was barred by s. 32 of Act X of 1859, was reversed on appeal. The Judicial Committee held that the cause of action accrued at the date of the decree cancelling the auction sale, and that the suit having been brought within three years from the date of that decree, limitation had not run.

(2) 8 B. L. R., 536.

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Eshan Chandra Rai v. *Khaja Asanula* (1); *Mohes Chandra Chaklidar* v. *Ganga Moni Dasi* (2); *Watson* v. *Dhorendra Chunder Mookerjee* (3).

Their Lordships' judgment was delivered by

SIR R. P. COLLIER.—In this case, the sole question is as to the application of the Law of Limitation. The claim is for rent from April 1866 to June 1872. The terms of the 29th section of Act VIII of 1869 of the Bengal Council are these: "Suits for the recovery of arrears of rent shall be instituted within three years from the last day of the Bengal year, or from the last day of the month of Jeyt of the Fasli or Willayatti year in which the arrear claimed shall have become due." It is admitted that in this case the suit was not instituted within three years from the end of the year when the last rent became due, and, therefore, *primâ facie*, it is barred by the Law of Limitation. This *primâ facie* case is endeavoured to be answered in this way: The plaintiff says that in 1874, that is to say, two years after the last instalment of the rent sued for had accrued due, the Statute ceased to operate because he instituted a litigation which had the effect of preventing it from running, and that, therefore, a portion at least of his claim is not barred. That litigation was this: He brought three suits in the year 1874 against the tenants with respect to whose arrears of rent the present action is brought, for the purpose of ejecting them from their holdings, which were called chakdari holdings, in a certain zemindari of which he was possessed. These suits were dismissed by the first Court, and on the 25th July 1876 by the Appeal Court, on the ground of limitation. On the 7th September 1876 the appellant commenced the present suit, concurrently with which he prosecuted an appeal to Her Majesty in Council from the decree of the 25th July 1876. His appeal was dismissed on the 26th May 1881.

The appellant contends that the Statute did not run against his claim for rent after the year 1874, when he commenced these suits; and for that proposition he relies solely on the authority of the case of *Ranee Surnomoyee* v. *Shoshee Mookhee Burmonea* (4).

(1) 16 W. R., 79. (3) I. L. R., 3 Calc., 6.
(2) 18 W. R., 59. (4) 12 Moore's I. A., 244; S. C., 2 B. L. R., P. C., 10.

Both Courts in India have decided against the appellant upon the ground that the Statute applies, and that his case does not come within the exception to the operation of the Statute established in the case of *Ranee Surnomoyee*—an exception rather apparent than real.

The effect of that case may be very shortly stated. The zemindar brought a certain patni taluk to sale, and sold it to a purchaser who was put in possession of it, and out of the purchase money the arrears of rent were paid. Subsequently this sale was set aside for irregularity; the zemindar had to refund the purchase money received by her, and the patnidar, who succeeded in setting it aside, obtained also the mesne profits for the time during which he was ousted. Under those circumstances this Committee, whose judgment was delivered by Sir James Colvile, observe: "It is clear that until the sale had been finally set aside, she"—that is, the plaintiff—"was in the position of a person whose claim had been satisfied, and that her suit might have been successfully met by a plea to that effect." In other words, the effect of the judgment of this Board is, that under the peculiar circumstances, the patnidar having recovered possession, together with mesne profits, it was equitable that he should pay the amount of rent which was in arrear; but that amount of rent did not accrue until the sale of the patni had been set aside, and, therefore, until that time the Statute could not run. This examination of that case shows it altogether to differ from the present. Here there was no period of time in which the rent could not have been recovered. There was no period of time in which, therefore, the Statute might not have run.

This case, therefore, being inapplicable, and no other case being relied upon, their Lordships have only humbly to advise Her Majesty that the judgment appealed against be affirmed, and that this appeal be dismissed.

Appeal dismissed.

Solicitors for the appellant, Messrs. *Barrow & Rogers.*

P. C.*
1882
March 17.

CHANDI CHURN SHASHMAL (DEFENDANT,) *v.* DURGA CHURN MIRDUA (PLAINTIFF.)*

[On appeal from the High Court at Fort William in Bengal.]

Appeal—Failure to produce evidence at hearing.

At the hearing of a suit a party, though he had sufficient warning of what was necessary, did not take the proper steps to cause the production of the documentary, and only admissible, evidence of a material fact which had to be proved by him; and the decision was against him.

The record of another proceeding would, it was said, have supplied this evidence; and an application had been previously made on which the order of the Judge was that "the matter would be decided when the case was tried, and the record would be sent for, if necessary." No further application to the Court was made, and no attempt to supply this evidence. *Held*, that if there had been, as there might have been, an oversight by the party in not calling the attention of the Judge to the above order, and in not tendering the evidence, there had been no omission on the Judge's part affording ground for appeal.

APPEAL from a decree of a Divisional Bench of the High Court (26th June 1878) affirming a decree of the Judge of the Midnapur District, (31st December 1877) affirming a decree of the Subordinate Judge of the same district (18th November 1876.)

The question raised on this appeal, preferred by a defendant against whom a decree for the possession of land had been made, related to the proceedings at the hearing of a suit in the Court of the Subordinate Judge of the Midnapur district, who finding no proof of a material fact, the affirmative whereof was a necessary part of the defendant's case, had decided against him.

All the facts relevant to this report are fully stated in their Lordships' judgment.

After an appeal to the District Court had been dismissed by the Officiating Judge, a special appeal was dismissed by a Divisional Bench of the High Court (L. S. JACKSON, and TOTTENHAM, J.J.)

Among the grounds of appeal filed in the High Court was one to the following effect *viz.*, that even if the non-filing of the record (which would have supplied the required evidence), had

* *Present:* SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH, and SIR A. HOBHOUSE.

arison through the inadvertence of the defendant's pleader, yet it would have been the duty of the District Judge, under the circumstances, to have admitted the same in regular appeal, as he was asked to do; and that as he had not done so, the Divisional Bench of the High Court should have remanded the case.

On this appeal—

Mr. *R. T. Doyne* appeared for appellant.

Mr. *C. W. Arathoon* for the respondent.

Their Lordships' judgment was delivered by

SIR R. COUCH.—This suit is brought for two parcels of land, containing 290 bighas, which are part of a parcel of 632 bighas. The case of the plaintiff is, that Mohunt Hoigrib Dass had obtained a money decree against Adjudhianath Manna and Sambhunath Manna, who held the 632 bighas on the 14th of January 1863, and had purchased the lands at the sale in execution thereof, and sold them to the plaintiff.

The defendant claims under a lease from the Government which was made in December 1871 for three years, and was renewed in April 1874.

The facts with regard to the 632 bighas, of which the 290 in suit form a part, are these:—The Government before 1816 was in possession of a large tract of land along the sea shore in the district of Midnapur, which was used for the purpose of making salt. In 1816 it granted a perpetual lease of 632 bighas of that land to Komolokant Manna, the predecessor in title of the above mentioned Mannas. The Government after that made an embankment by which the land thus leased was left outside next to the sea, and subsequently, in 1858, there was an arrangement between the Government and the Mannas by which, as the lands which were left outside the embankment became less valuable for the purpose of cultivation, but were valuable for the purpose of making salt, the Mannas were to have an equal portion of land inside the embankment, and the Government was to take the lands which were outside. Before this a local Rajah, who (and whose successor) was called in the suit "the Rajah," had brought a suit against the Government to recover the lands

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which lay outside the embankment, and had obtained a decree for all the lands which were outside. In consequence of this the Government directed the Mannas to pay to the Rajah the rent which had been reserved on the lease; and thus after the arrangement the Mannas were in possession of 632 bighas lying inside the embankment, but paying rent to the Rajah as for the land which was outside. The Mannas having allowed their rent to fall in arrear, the Rajah brought a suit, on the 19th of July 1862, to recover arrears of rent from 1855 to 1862. The suit was brought for a moiety of the rent, as, in consequence of death, it would seem that the Rajah's estate had become divided. A decree was obtained by him on the 27th of March 1863, and an order for attachment and sale was made on the 18th of August 1863. It was contended by the defendant that on the 27th of February 1865, at the sale under that attachment, the whole of the 632 bighas outside the embankment was sold, and the Government was ousted from it, and that in consequence thereof the Government ejected the Mannas from the land which had been taken in exchange, and which was inside, the suit having been brought about, and the loss of the outside land by the Government having been caused by the failure of the Mannas to pay the rent. Therefore the material question in the case was, whether the outside land originally leased had been sold at the auction on the 27th February 1865, and an issue was framed raising that question. It was the third issue, "Whether or not, in consequence of Sambhuram and another's"—that is the name used for the Mannas—"non-payment of the rent of their mal lands, the zemindar obtained a decree and effected the sale of those lands; and the Government, again taking the disputed lands from Sambhuram and another,"—being the lands inside the embankment,—"were in possession from 1865, and settled the lands with the defendant," referring to the lease in 1871. An application appears to have been made shortly before the suit came on for hearing on the part of the defendant in which he asked to have the documents relating to the exchange of the land in dispute, which had been filed in another suit numbered 141, referred to in this suit, and the order made on that occasion was, that the matter would be decided when the case

was tried, and the record would be sent for, if necessary. The other suit was one which had been brought by the defendant against a brother of the plaintiff, and related to another portion of the 632 bighas. It was said that the exhibits in that suit would furnish evidence of what was sold on the 27th February 1865.

The case came on to be heard before the Subordinate Judge, and it would appear that no further application was made to him to send for the record of the other suit, and no attempt was made to use the documents which had been filed in that suit, but the case was decided upon the oral evidence, and the Judge held that it had not been satisfactorily proved that the lands outside the embankment had been sold. He said: "It is true that some of the plaintiff's witnesses have said in their depositions that the lands on the outside were sold, but it has not been satisfactorily proved; and upon the said oral evidence it cannot be said that the lands on the outside were sold on account of debts due to the zemindar, nor, supposing they were sold, does it appear for what reason they were sold. "The defendant should have given evidence to prove this matter by means of papers of the Court." If there had been, as there might, an oversight on the part of the pleaders for the defendant in not calling the attention of the Judge to the order which had been made on the 3rd of November 1876, or in not tendering in evidence, which might have been done, the sale proceedings of the 27th of February 1865, he might have applied to the Judge for a review; and if he had refused it, the case might have been carried to the Court of Appeal, and an application made that the evidence should be received. There was an appeal, but in the grounds of appeal, instead of this matter being brought to the attention of the Court, the ground taken was that "it has been proved by the evidence of the witnesses of both the parties that the lands given in exchange by Adjudhianath were sold by auction, and that the sale certificate has been filed." The sale certificate which was filed did not prove it. "The plaintiff does not object on the ground that the said lands were not sold." The issue had been raised on that very point. "Consequently the lower Court should

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have held that the lands given in exchange had been sold by auction." The Court, in the judgment on the appeal, stated that it had been urged before it "that the Subordinate Judge ought to have sent for the record of the suit No. 141 above mentioned, which contains copies of the papers relating to the auction sale of February 1865, in order that it might be seen that the lands formerly held by Adjudhianath"—that is, the Mannas—"outside the embankment were really sold;" and therefore, although the objection was not taken in the grounds of appeal, it seems to have been allowed to be taken at the hearing. The judgment was: "This Court is of opinion that it ought not to interfere with the judgment appealed against. It was the duty of the defendant-appellant, who raised a special plea, to adduce proof in support of it; but he failed to do so; and he neither pressed for the production of the misl of suit No. 141 in the lower Court, nor urged any objection on this subject in his petition of appeal. To allow the objection now would be taking the plaintiff-respondent by surprise. Oral evidence is, of course, inadmissible to prove the particulars of the auction sale of February 1865. No objection in point of law could be taken to that judgment, considering what had been done. It was a perfectly correct judgment. There was a special appeal from it; and the High Court, as might have been anticipated, held that there was no ground for the special appeal. The defendant, the appellant, now comes on appeal to Her Majesty in Council, and says:—

"This appellant now humbly submits there is error in the judgment of the lower Appellate Court, and of the High Court, and that they should be reversed or varied for (among others) the following reasons: because the fact on the supposed non-proof of which the Judge put his judgment was not in issue or disputed; and if supposed to be disputed, this appellant should have been allowed to prove it by the production from the other record of the papers therein relating to the said sale in execution."

Their Lordships have already mentioned that it was put in issue and was disputed, and the present appellant had no right to assume that he need not prove it. He had sufficient warning that it was necessary for him to do so; and as to his saying that he should have been allowed to prove it by the production from

the other record of the papers, the answer is that if he had produced those papers, or if he had taken the proper steps to have them in the first Court, and had tendered them in evidence, he might, if they had been rejected, have made it a ground of appeal. But he did not do what was proper and necessary, and their Lordships are of opinion that he has shown no ground for reversing the decisions of the lower Courts.

Their Lordships will, therefore, humbly advise Her Majesty that the appeal be dismissed; and the appellant will pay the costs

Appeal dismissed.

Solicitors for appellant, Messrs. *Miller, Smith* and *Bell.*

Solicitors for respondent, Mr. *T. L. Wilson.*

P. C.*
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May 11.

PORESHNATH MUKERJI AND OTHERS, (DEFENDANTS) AND ANATHNATH DEB, (PLAINTIFF.)

[On appeal from the High Court at Fort William in Bengal.]

Estoppel—Evidence Act, s. 115—*Sale in execution of decree—Intervenor in Rent Suit.*

A purchase by a mortgagee, at a sale in execution of a decree upon his mortgage, of the right, title, and interest of the mortgagor, who has been estopped from asserting a title to the property as against certain parties, does not place such mortgagee in a better position as regards the estoppel.

A suit for rent by a zemindar and patnidar against a darpatnidar, was defeated by the defence of the latter that he had conveyed his interest to others, against whom the former afterwards obtained a decree, and brought the darpatni to sale in execution, buying their right, title, and interest therein himself. From the darpatnidar, who had thus disclaimed title, a third party claimed to be mortgagee, and set up a decree on his mortgage followed by a purchase of the tenure at a sale in execution. He was thereupon allowed to intervene in a suit for rent brought by the zemindar and patnidar against an ijaradar of lands within the darpatni estate.

Held that, notwithstanding this purchase, the intervening mortgagee was bound by the estoppel arising out of the mortgagor's disclaimer of title in the suit above-mentioned.

APPEAL from a decree of a Divisional Bench of the High Court,

* *Present*: SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH, and SIR A. HOBHOUSE.

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(21st November 1878), (1) reversing a decree of the Judge of the Birbhum District 1877, and dismissing the suit of the plaintiff, now represented by the appellant, with costs.

Among certain patni, darpatni, and se-patni tenures, under the zemindari of Shah Alampur, of which the late Aushotas Deb and Promotho Nath Deb were formerly joint proprietors, a certain darpatni estate, having been sold under Regulation VIII of 1819, for arrears of rent, was purchased in 1852 by Ishan Chandra Sein. In 1858 Ishan Chandra Sein executed a document purporting to convey this estate to his wife Kripamoyi, his son Dhun Krishna, (and another son, then a minor), and in their favor were executed instruments, completing the darpatni title by the executors of Aushotas Deb's estate. In 1871 Bistu Chandra Rai took an ijara for five years of lands called Loba Bhadra, within this darpatni estate.

The present respondent, Anathnath Deb, son of Promotho Nath Deb, succeeded to the zemindari, and also patnidari, as well as other estates in that part of Shah Alampur which included the darpatni estate; and on the 22nd August 1872, he sued Ishan Chandra Sein in the Court of the Subordinate Judge of Birbhum for rent due in respect of Loba Bhadra. In answer to that suit Ishan Chandra Sein put forward the above-mentioned conveyance of 1858 of the darpatni, including the mehal Loba Bhadra, to his wife and son, alleging that he had sold the estate to them for value, and had no title therein himself. The suit for rent was, accordingly, on this evidence supported by Dhun Krishna's, dismissed.

Thereupon Anathnath Deb, on the 13th March 1873, sued Kripamoyi and Dhun Krishna, for the rent of the mehal, and obtaining a decree, he brought it to sale in execution, purchasing their right, title, and interest therein himself. The present suit was brought by Anathnath Deb on the 5th June 1876, against Bistu Chandra Rai, the ijaradar, to recover the rent due from him for the last seven months of his term, amounting with interest, and with the addition of a sum due for road-cess, to about Rs. 1,024. The defence was that the person entitled as darpatnidar to the rent of the Loba Bhadra mehal, was Poreshnath Mookerjee, who was permitted to

(1) See *Anathnath Deb* v. *Bistu Chundra Rai*, I. L R., 4 Calc., 783.

intervene in the suit. His allegation was that before the suit of 13th March 1873 was brought, *viz.*, on the 11th January 1873, Ishan Chandra Sein, being in debt, hypothecated the Loba Bhadra mehal to him, and that he, afterwards in September 1875, obtained a decree upon his mortgage, and in the same month purchased at a sale in execution of that decree all Ishan Chandra's rights in Loba Bhadra.

Whether the representatives of Poreshnath Mookerjee, (who had died pending these proceedings,) were not bound by an estoppel that would have prevented Ishan Chandra Sein from contesting the title made through the conveyance of 1858 to his wife and sons, was the question now raised.

The judgment of the Court of First Instance was that the intervenor's allegation was proved, and that the plaintiff Anathnath Deb had no right to the rent claimed against the ijaradar of Loba Bhadra. On appeal to the High Court that decision was reversed. It was held that Anathnath Deb had acted on the belief, induced by Ishan Chandra's representations, that the darpatni estate had been transferred by him, and that he had purchased from those who had thus been represented to be the owners; and that as Ishan Chandra would himself have been precluded from setting up the opposite state of facts, so also Poreshnath Mookerjee was estopped.

The judgment of the Divisional Bench (SIR R. GARTH, C.J., and TOTTENHAM, J.) is reported in the I. L. R., 4 Calc., 783.

On this appeal Mr. *J. F. Leith, Q.C.*, and Mr. *R. V. Doyne*, appeared for the appellants.

Mr. *J. T. Woodroffe* for the respondents.

For the appellants it was argued that the evidence showed that Anathnath Deb had notice that the transfer by Ishan Chandra Sein in 1858 to his wife and sons was only benami; nor was it merely the representation of Ishan Chandra Sein, that he had *bona fide* transferred to them, that had induced the respondent to purchase from the benamidars. The decisions of the Courts had led him to treat them as the owners. On the other hand Poreshnath Mookerjee had not set up a claim founded only on a mortgage or

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assignment from Ishan Chandra Sein, but claimed as purchaser at the sale in execution of the decree obtained by him.

Reference was made to the Evidence Act, 1872, s. 115.

Co. Litt. 352*a*; Comyn's Digest title Estoppel; *Richards* v. *Johnston* (1); and *Dinendronath Sanial* v. *Ramkumar Ghose* (2).

Mr. *J. T. Woodroffe*, for the respondent, was not called upon.

Their Lordships' judgment was delivered by

SIR R. COUCH.—The question in this appeal, which is from a decision of the High Court at Calcutta on an appeal from the District Court, is stated by the learned Chief Justice in giving the judgment of the High Court, in which he says: "The point upon which, in our opinion, this case should be decided is rather of a peculiar nature. The plaintiff is the zemindar of a share in a property called lot Shah Alumpur, and he also claims to be the darpatnidar of a portion of the same property. In his character of darpatnidar, he brings this suit against the defendant No. 1, Bistu Chandra Rai, as ijardar of part of the estate for rent and for road-cess. The defendant resists the claim upon the ground that Poreshnath, the defendant No. 2, is the real owner of the darpatni; and the defendant No. 2 has intervened for the purpose of supporting his title to the rent as against the plaintiff. It appears that some time ago, in the year 1259 (A.D. 1852), one Ishan Chandra purchased, and was the undoubted owner of this darpatni estate. In the year 1265 (A.D. 1858), Ishan Chandra, being in difficulties, sold or professed to sell the darpatni to his wife Kripamoyi and his son Dhun Krishna; and thereupon the the names of Kripamoyi and his son Dhun Krishna were entered in the plaintiff's serishta as the owners of the darpatni." It has been suggested that this is not correct; there is a question whether it was in the plaintiff's serishta, but it is not material: "After this sale, the rent of the darpatni being in arrear, the plaintiff (whether in ignorance of the sale or not does not appear) brought a suit for the rent against Ishan Chandra who defended the suit upon the express ground that he was no longer the tenant, and that he had parted with his interest in the darpatni to his wife

(1) 4 H. and N, 660.

(2) I. L. R., 7 Calc., 107; S. C., L. R., 8 I. A., 65.

and son; and he not only defended the suit on this ground, but he stated in his evidence that the sale to his wife and son was an absolute and *bonâ fide* one; that the darpatni really belonged to them, and that he had no right or interest in it."

It appears from what has been stated by the learned Counsel for the appellant that in this suit Ishan Chandra put in a written statement to this effect on the 7th November 1872, and the suit was dismissed on the 18th November 1872. The learned Chief Justice proceeds: "Upon the strength of this evidence Ishan Chandra defeated the plaintiff's suit, and the plaintiff had to pay the costs of it. Having failed in that suit, the plaintiff then brought another suit for the same rent against Kripamoyi and Dhun Krishna. He obtained a decree against them, and under that decree the darpatni was sold, and the plaintiff himself became the purchaser of it. Upon the title thus acquired the plaintiff brings the present suit against the defendant No. 1"—Bishtu Chandra Rai,—"the ijardar of that portion of the property; and assuming that the title derived in this way is a good one, there is no doubt as to his right to recover the rent as against the defendant No. 1." Then the learned Chief Justice alludes to the question of the amount to be recovered which the appellant was willing to give up, and, in order to avoid the necessity of a remand, says: "Consequently the only point for our consideration is, whether the plaintiff on the one hand, or the intervening defendant on the other, is entitled to the rent of the darpatni. The claim which the intervening defendant sets up is by right of Ishan Chandra. He says that Ishan Chandra mortgaged the property to him, and that such proceedings have been taken upon that mortgage that he is now entitled, in Ishan Chandra's rights, to the rent of this property as the owner of it."

The proceedings thus alluded to were these: On the 11th January 1873, about three months after the written statement had been put in by Ishan Chandra and the suit had been dismissed, a mortgage bond was given by Ishan Chandra to Poreshnath, who brought a suit upon it and obtained a decree on the 6th September 1875, which Mr. Leith, who was counsel for the appellant, stated, although the form of the decree does not appear, was the ordinary decree as upon a mortgage bond. On the 13th Septem-

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ber 1875 he obtained an order for sale in execution of that decree, and the sale took place on the 18th December 1875, being a sale of the right, title, and interest of Ishan Chandra, and Poreshnath became the purchaser for the sum of Rs. 5,600. The certificate of sale was granted on the 24th March 1876, and in that it is stated that Poreshnath purchased the property for Rs. 5,600, and had put in a receipt crediting the amount of consideration against the decretal amount receivable by him. In fact, he did not pay any money upon the purchase which he had made at the sale, but became the owner of the property in satisfaction of his mortgage. It was decided by the first Court that the intervening defendant had a right to go into the question whether Ishan Chandra were the real owner of the darpatni or not, and that Court found upon the evidence that the sale by him to his wife and son was a benami transaction, and that Ishan Chandra was the owner. Consequently the question really is, whether Poreshnath is estopped by the written statement which Ishan Chandra made in the former suit. The learned Chief Justice says: "It appears to us that, inasmuch as the intervening defendant claims under Ishan Chandra and can take no better title than Ishan Chandra himself, and as Ishan Chandra has directly induced the plaintiff to believe that he had sold his property absolutely to his wife and son, and led him to bring a suit against them for the rent, and under the decree obtained in that suit to purchase their interest in the property, it does not lie in the mouth of Ishan Chandra, or any one claiming under him by a subsequent title, to set up a claim to the rent in this suit as against the plaintiff."

Their Lordships think that is a right conclusion; that, looking to what took place, Poreshnath cannot be considered as having put himself, by reason of his purchase at the sale which he had brought about in execution of his decree on the mortgage bond, in a better position than he was in as mortgagee taking from Ishan Chandra. It is admitted that if he had claimed as a mortgagee or as an assignee of Ishan Chandra he would be estopped: and their Lordships think that he is substantially in the same position; that he did not by purchasing in this way put himself in a better position; and consequently that he is estopped by the statement which

Ishan Chandra made, and that the decree of the High Court is correct.

Their Lordships will therefore humbly advise Her Majesty to dismiss the appeal; and the costs thereof will be paid by the appellant.

Appeal dismissed.

Solicitors for the appellants, Messrs. *Oehme and Summerhays.*

Solicitor for the respondent, Mr. *T. L. Wilson.*

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Norris.

BAL MOKOOND LALL AND ANOTHER (DEFENDANTS) *v.* JIRJUDHUN ROY AND OTHERS (PLAINTIFFS).*

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Sale for arrears of revenue, Suit to set aside—Act XI of 1859, *ss* 6, 20, 35—*Beng. Act VII of* 1868, *s.* 8—*Certificate of title—Secretary of State—Parties—Civil Procedure Code (Act X of* 1877) *ss.* 32, 424.

A notification by the Collector under s. 6 of Act XI of 1859, fixing the 31st May 1879 as the date for holding the sale, was affixed in the places mentioned in the section on the 2nd May 1879. Subsequently the 31st May being ascertained to be a holiday, and the 1st June being a Sunday, the Collector, purporting to act under s. 20 of the Act, issued a notification on the 26th May, postponing the sale till the 2nd June. On that day the sale was held, and the Commissioner having upheld it on appeal, a certificate of title was given to the purchasers.

Held, in a suit to set aside the sale, that inasmuch as the notification under s. 6 of the Act had not been affixed thirty days before the day fixed by it for holding the same, the requirements of that section had not been fulfilled, and the irregularity was not cured by the notification of the 26th May.

Held, further, that the Court was not bound under s. 8 of Beng. Act VII of 1868 to presume conclusively that the provisions of s. 6 of Act XI of 1859, as regards the fixing of the date of sale, had been complied with. Under s. 8 of Beng. Act VII of 1868 the effect of a certificate of title having been given to the purchaser is merely that the Court is bound to presume conclusively the due service and posting of notices.

* Appeal from Original Decree No. 80 of 1881, against the decree of Baboo Abinash Chunder Mitter, Rai Bahadoor, Officiating Subordinate Judge of Sarun, dated the 14th February 1881.

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The Secretary of State is not a necessary party to a suit to set aside a sale for arrears of revenue, but the Government have such interest as would, on their application, entitle them to be made a party.

Section 424 of the Civil Procedure Code does not preclude a Court from adding the Secretary of State as a necessary party under s. 32 of the Code.

The facts and arguments in the case appear from the judgments of the Court (MITTER and NORRIS, J.J.)

Baboo *Mohesh Chunder Chowdry* and Baboo *Srinauth Bannerjee* for appellants.

Baboo *Chunder Madhub Ghose* and Baboo *Abinash Chunder Banerjee* for the respondents.

MITTER, J.—This suit was brought to set aside a revenue sale held under Act XI of 1859 on the ground that the sale was made contrary to the provisions of the aforesaid Act, and that the plaintiffs had sustained substantial injury by reason of the irregularity complained of in the plaint. The suit was brought under the provisions of s. 33 of the Act. The lower Court has awarded a decree in favour of the plaintiffs. It has found that the notification required to be affixed in the Court of the Judge of the District, and in the Office of the Collector under s. 6 of the Act was not affixed 30 days before the date fixed in the notification for holding the sale. The lower Court has further found that the notifications required by s. 7 of the Act to be affixed in his own office, as well as in the Munsiff's Court and Police Thanahs within which any part of the estate is situated, as also at the cutcherry of the owner of the estate, or at some conspicuous place upon the estate, were not duly affixed and promulgated. Upon the question whether the plaintiffs have sustained any substantial injury or not, the finding of the lower Court is that the property sold is worth at least Rs. 10,000, and that it was sold for Rs. 2,200 only. With reference to this last point, which involves only a question of fact, the evidence bearing upon it has been placed before us, and we agree with the lower Court that the conclusion to which it has come is correct. As to the question raised with reference to the provisions of s. 6, Act XI of 1859, the admitted facts are these: The sale notification under that

section was affixed in the particular places mentioned in the section on the 2nd May 1879, and the date fixed in that notification for holding the sale was the 31st May of that year. It so happened that the 31st May was a holiday, and the day following, *viz.*, the 1st of June, was a Sunday. The Collector, therefore, professing to act under the provisions of s. 20, Act XI of 1859, issued a notification, either on the 25th or 26th May 1879, that the sale was to be held on the 2nd of June, and accordingly the sale in question was held on that date. The question is whether under the circumstances stated above the notification was issued and affixed in accordance with the provisions of s. 6, Act XI of 1859.

Section 6, omitting the words, which are not material to the question now before us, is to the following effect: "The Collector or other officer duly authorized to hold sales under this Act, shall issue notifications in the language of the district, to be affixed in his own office, and in the Court of the Judge of the district, specifying the day on which the sale of the same will commence, which day shall not be less than thirty clear days from the date of affixing the notification in the office of the Collector or other officer as aforesaid." It is contended on behalf of the appellant that this section should be read as if laying down two distinct provisions, *viz.*, one requiring the issuing and affixing of a notification in which the date of the sale should be specified, and the other laying down that the actual sale should not take place until after the lapse of 30 clear days from the date of the affixing of the notification. I am of opinion that this construction cannot be reasonably put upon the section in question; because it says that the notification shall specify the day on which the sale of the estate will commence, *which day* shall not be less than 30 clear days from the date of affixing the notification in the Office of the Collector or other offices as aforesaid." Therefore *the date of sale to be specified* in the notification should be one which should happen to be more than 30 days from the date of its affixing. If this is the proper construction of this section it is quite clear that its provisions were not complied with in this case, because in the notification which was affixed on the 2nd of May the date of sale specified was the 31st May, and therefore it was less than 30 days from the date of affixing the

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notification. If the other construction had been intended by the legislature, then in that case we should have found some other provision in the Act which would have authorized the Collector, in a case like this, to alter the date of the sale. It was contended before us that this power is given to the Collector under the provisions of s. 20 of the Act, but I am of opinion that under s. 20 the Collector had no power in a case like this to alter the date of the sale. Section 20 says: "In case the Collector or other officer as aforesaid shall be unable, from sickness, from the occurrence of a holiday, or from any other cause, to commence the sale on the day of sale fixed, &c." It was contended that the words "any other cause" would authorize the Collector to alter the date of the sale in a case like the present, but I am of opinion that this contention is not correct. It is a well known rule of construction that general terms following particular ones apply only to such things as are *ejusdem generis*. The particular causes for altering the day of sale under section 20 are sickness or the occurrence of a holiday. "Any other cause" mentioned after these words must be one similar in its kind to those specified in the section. Therefore I do not think that the Collector could, in a case like this, under s. 20, alter the date of the sale. That being so I am of opinion that the requirements of s. 6 were not fulfilled.

Then it was contended that under the provision of s. 8, Beng. Act VII of 1868, the Court is bound to presume conclusively that the provisions of s. 6, Act XI of 1859 even as regards the fixing of the date of the sale were complied with. Section 8, Act VII of 1868 is to the following effect: "Every certificate of title which may be given to any purchaser under the provisions of s. 28 of the said Act XI of 1859, or of s. 11 of this Act, shall be conclusive evidence in favour of such purchaser and of every person claiming under him, that all notices in or by this Act, or by the said Act XI of 1859, required to be served or posted, has been duly served and posted." In this case it is not disputed that the defendant obtained a certificate of sale under the provisions of s. 28, Act XI of 1859. The effect of obtaining that certificate under Act VII is in my opinion simply this: That the Court will be bound to presume con-

clusively that any notice or notification required to be posted or served under Act XI of 1859 and Beng. Act VII of 1868 was *duly served and posted.* This section does not mean that the Court is bound to presume that the notification was affixed in the places mentioned in s. 6 thirty days before the date fixed in the notification as the date of sale. This view is further confirmed by the latter part of the section itself, which says: "And the title of any person who may have obtained any such certificate, shall not be impeached or affected by reason of any omission, informality, or irregularity as regards the *serving* or *posting* of any notice in the proceedings under which the sale was held, at which such person may have purchased." This shows that any omission, informality, or irregularity *as regards the serving or posting* of the notification would not be a ground for setting aside the sale, but it does not lay down that an omission to fix the date of sale in accordance with the provisions of s. 6, Act XI of 1859, would not affect the title of the purchaser. I, therefore, entirely agree with the lower Court that in this case the provisions of s. 6, Act XI of 1859 were not complied with. In this view of the case it is immaterial to enquire whether the finding of the lower Court with regard to the serving or affixing of the notification under s. 7 is correct or not.

The learned pleader for the appellant has raised another question before us, *viz.*, that under s. 33 of the Act under which the present suit was brought, the plaintiff is not entitled to succeed in this action unless he shows that the ground of irregularity, upon which he impeaches the sale, was the ground upon which he preferred the appeal to the Commissioner which is provided for in the Act. Now s. 33, so far as it is material with reference to this point, is to the following effect: "No sale for arrears of revenue or other demands, realizable in the same manner as arrears of revenue are realizable, made after the passing of this Act, shall be annulled by a Court of Justice, except upon the ground of its having been made contrary to the provisions of this Act, &c." Therefore, it seems to me that if the plaintiff had impugned the sale before the Commissioner in his application for appeal upon the ground that the sale was made contrary to the provisions of Act XI of 1859, it would be a sufficient compliance

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with the provisions of s. 33. Referring to the petition filed by the plaintiff before the Commissioner, we find that the ground taken was sufficiently general to bring it within the purview of s. 33. The sixth ground is to the effect "that irregularities took place in all the proceedings of sale, hence the sale is by all means fit to be set aside." This is tantamount to saying that the sale was made contrary to the provisions of Act XI of 1859. I am, therefore, of opinion that this ground of appeal also should fail. This disposes of all the questions raised before us regarding the merits of the case.

Then a question was raised to the effect that the plaintiff was bound to make the Secretary of State a party to this suit, and in support of the appellant's contention upon this point our attention was drawn to the provisions of s. 35, Act XI of 1859. That section says: "In the event of a sale being annulled by a final decree of a Court of Justice, and the former proprietor being restored to possession, the purchase money shall be refunded to the purchaser by Government, together with interest at the highest rate of the current public securities." Comparing this section with the analogous section in Regulation VIII of 1819, *viz*, s. 14, which is to the effect that "the purchaser shall be made a party in such suits, and upon decree passing for reversal of the sale, the Court shall be careful to indemnify him against all loss, at the charge of the zemindar or person at whose suit the sale may have been made," it appears to me that this section 35 by itself does not afford any ground for the contention that the Secretary of State was a necessary party to the suit. It merely provides that in the event of a sale being annulled by a final decree of a Court of Justice, and the former proprietor being restored to possession, the purchase money shall be refunded to the purchaser by Government, together with interest at the highest rate of the current public securities. But although it appears to me to be clear that s. 35 does not afford any support to the contention raised before us, yet it is by no means clear that the Government was not interested in the question raised in the suit, because, if the sale be set aside, the Collector will have to proceed *de novo* in the matter for the realization of the arrears of revenue. The Government, therefore,

have such interest in the suit as would, on their application, entitle them to be made a party to it.

Further the lower Court was not, in my opinion, right in holding that under the provisions of s. 32 it could not add the Secretary of State as a party to the suit. The section referred to by the lower Court, *viz.*, s. 424 of the Procedure Code, does not preclude the Court from adding the Secretary of the State as a necessary party under the provisions of s. 32 of the Act. Section 424 only says that no suit *shall be instituted* against the Secretary of State in Council or against a public officer in respect of an act purporting to be done by him in his official capacity, unless a certain notice be given. But be that as it may, I am of opinion that in this case the defect of parties (if there was any) does not entitle the defendants on the record to contend that the present suit should be dismissed. I am, therefore, of opinion that this ground of appeal should also be overruled.

Then there remains the question of costs. It is true that in this case if any party should have been made liable for the costs of the suit it was the Collector, by whose irregular proceedings the sale took place; but the Collector was not made liable, and he is not before us in this appeal. It would be, in my opinion, unjust to make the defendants liable for the costs of the lower Court, and, therefore, the defendants should have been declared entitled to recover the costs of the lower Court from the plaintiff; but then after the decree was passed in favour of the plaintiffs, the defendants had no valid grounds of appeal to come up to this Court. They have, therefore, rendered themselves liable to pay the costs of the plaintiffs, respondents, in this appeal. Under these circumstances we think it will meet the ends of justice if we direct that each party should bear their own costs throughout the litigation.

NORRIS, J.—This is an appeal from the decision of the Officiating Subordinate Judge of Sarun, dated 11th February 1881, setting aside a revenue sale on the ground of irregularity, and that consequential injury had taken place. We are now asked to set aside the decision of the Court below. I agree with my learned brother that that judgment should be confirmed, and I will

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deal very shortly with the points made by the learned pleader who has appeared for the appellant before us to-day. His first ground of argument was that, assuming the Court below was right in holding that there had been an irregularity in the advertisement of the sale, that irregularity was not sufficient to warrant the sale being set aside; secondly, he urged that there was no irregularity; thirdly, that the plaintiffs could not be permitted to urge that ground here to-day, because they had not, in their petition of appeal to the Commissioner, complied with the requirements of s. 33, Act XI of 1859; and, lastly, it was urged before us as a matter of fact that the evidence on the paper book did not prove substantial injury. I will notice the last ground—the question of fact—first, beginning with the general observation that I should hesitate to reverse a decision passed in the Court below on a question of fact unless irresistibly compelled so to do, for this reason, that the Judge in the Court below has the inestimable advantage of having the witnesses examined and cross-examined before him, and is, therefore, able to form a far better opinion as to the value of their evidence than we can do sitting here in a Court of appeal. Upon that general ground I should hesitate long before I reversed a decision of a lower Court on a question of fact. But in this case the evidence abundantly bears out the facts necessary for the plaintiffs to prove that there had been substantial injury or damage caused to them by reason of the irregularities which have taken place in the conduct of the sale. I need not go into the evidence in detail; it has been laid before us at length by the learned pleaders, and it satisfies my mind fully that on the question of fact the plaintiffs' case was made out.

The next point to consider is, has there been an irregularity in the proceedings connected with the sale? That depends upon the construction to be placed upon s. 6, Act XI of 1859. (His Lordship read the section). Now the object of this section, I apprehend, was to give what the Legislature thought, reasonable publicity to the sale, and the real meaning of the section is that this should be done by means of affixing the prescribed notices strictly in time, or not less than thirty days before the date fixed for the sale. That is the real meaning of the

section, and if that be so, we have to consider whether that has been done in this case. It is admitted that this notice was not posted till the 2nd of May, and it is said that the sale was to take place on the last day of May. It is clear, therefore, that if the sale had taken place on the 31st of May the statutory period would not have elapsed. Then it is urged that this irregularity may be cured by reference to s. 20 of the Act of 1859, the marginal note of which is "adjournment of sales." The section is as follows: "In case the Collector or other officer as aforesaid shall be unable, from sickness, from the occurrence of a holiday, or from any other cause, to commence the sale on the day of sale fixed as aforesaid, or if, having commenced it, he be unable, from any cause, to complete it, he shall be competent to adjourn it to the next day following, &c." I agree with all that my learned brother has said as to the non-applicability of this section to cure the defect under s. 6, but further, when in s. 20 we find the words "to commence the sale on *the day of sale fixed*," this must refer to a day of sale which has been legally fixed. You could not adjourn a meeting which an Act of Parliament requires to be convened at 12 days' notice if only an 11 days' notice has been given; you cannot adjourn an illegally called meeting, and you can only adjourn a sale fixed for a certain day when it has been *legally* fixed for that day. Therefore s. 20 will not avail to cure the defect which, in my opinion, manifestly has arisen under the provisions of s. 6. Then the learned pleader says: "Assume all that against me I crave in aid s. 8, Beng. Act VII of 1868. I am of opinion that this section will not avail to help the appellant in this case. The Act does not say that it shall be conclusive evidence that the proper statutory notice was given; it does not say it shall be conclusive evidence that a notice having been posted the right notice was posted, and that the contents of the notice were such as by s. 6, Act XI of 1859, they are required to be; all that this section intended to do was to render it unnecessary to call evidence to show that the notice itself had been posted, but it is still necessary to prove that the contents of the notice are such as are required by s. 6, Act XI of 1859. Then it is further urged that this ground of appeal was not available because the provisions of s. 33 of

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the Act of 1859 had not been complied with. Section 33 says: "No sale for arrears of revenue or other demands realizable in the same manner as arrears of revenue are realizable, made after the passing of this Act, shall be annulled by a Court of Justice, except upon the ground of its having been made contrary to the provisions of this Act; and then only on proof that the plaintiff has sustained substantial injury by reason of the irregularity complained of; and no such sale shall be annulled upon such ground, unless such ground shall have been declared and specified in an appeal made to the Commissioner under s. 25 of this Act." Therefore what the plaintiffs have to show is, in sending in this petition of appeal, that substantial injury has been sustained, and that the sale has been made contrary to the provisions of this Act. Now it seems to me that if the petition of appeal to the Commissioner, instead of being as precise and elaborate as it is, had simply said that the sale had been made contrary to the provisions of the Act, and that the plaintiff had sustained substantial injury, and confined itself to these two narrow statements, it would have been amply sufficient to have enabled the plaintiffs to raise the point here to-day.

Upon the questions of the non-joinder of the Secretary of State and of costs I entirely concur with my learned brother, and I do not think that I should add anything to what he has said.

On the whole I agree that this appeal should be dismissed.

Appeal dismissed.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Bose.

1882 *July 7.*

IMAM BUKSH MONDUL (DEFENDANT) *v.* MOMIN MONDUL (PLAINTIFF).*

Limitation—Beng. Act VIII of 1869, *s.* 27—*Landlord and Tenant—Possession, Suit for, on dispossession by Landlord—Title, Claim for declaration of.*

Where a suit by a tenant against his landlord is both in form and

* Appeal from Appellate Decree No. 1,429 of 1880 against the decree of L. B. B. King, Esq., Judge of Dinagepore, dated the 14th May 1880, affirming the decre of Baboo Nil Madhub Shamunto, Munsiff of Patnitola, dated the 5th January 1880.

substance one to recover possession on the ground of illegal dispossession by the landlord, and no question of the plaintiff's title is raised, the insertion in the plaint of a claim for declaration of the plaintiff's title is not sufficient to prevent the application of the limitation prescribed by s. 27 of Beng. Act VIII of 1869.

Mussamut Dhurjobutty Chowdrain v. *Chamroo Mundul* (1), distinguished.

THE plaintiff, alleging that his father Sona Mondul had been in possession of a certain jote, and that on his death the plaintiff and other co-sharers had succeeded to, and had been in possession of, the jote until the 14th July 1878, when the landlord had illegally dispossessed them, instituted this suit on the 30th August 1879 against his co-sharers and the landlord, for possession of his share in the jote on his title thereto being established.

The landlord alleged that the plaintiff and his co-sharers had voluntarily relinquished possession of the jote.

Both the lower Courts having decided in favour of the plaintiff, the landlord appealed to the High Court upon the ground, amongst others, that the suit was barred by limitation under s. 27 of Beng. Act VIII of 1869.

Baboo *Kishori Mohun Roy* for the appellant.

Baboo *Ram Churn Mitter* for the respondent.

The judgment of the Court (GARTH, C.J., and BOSE, J.) was delivered by

GARTH, C.J.—The plaintiff, as one of the sons of Sona Mondul, a deceased Mahomedan, sued for possession of a 4-annas share in a certain jote, on the allegation of dispossession therefrom by the defendant (landlord) in Assar 1279 (June 1872). The defendant pleaded that the plaintiff and his brothers, not being able to hold on the jote by paying its rent, relinquished the same in Joisto 1279 (May 1872), and fled away to a different village.

Both Courts have found that the plaintiff and his brothers were forcibly turned out from the lands by the defendant's predecessors,

(1) 25 W. R., 217.

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and have consequently decreed the plaintiff's claim; the lower Appellate Court holding that one year's limitation under s. 27 of the Rent Law did not apply to the suit.

It has been argued here that the lower Appellate Court was wrong on this question of limitation; and we think the contention is well founded. The plaintiff's suit, both in form and substance, was to recover possession of his jote, having been forcibly dispossessed by the defendant.

The defendant's answer was that he did not dispossess the plaintiff, but that he voluntarily relinquished his holding. No question of title was raised in the case; and it was not denied that at the time of the dispossession or relinquishment, as the case might be, the plaintiff held the jote which he claims.

Under these circumstances it seems to us that this is a suit for possession within the meaning of section 27 of the Rent Law, and that the plaintiff cannot make it other than a suit for possession by inserting in his plaint that he desires to have his right established. If this were enough to take the case out of the operation of the section, a plaintiff might always get rid of the one year's limitation by inserting a claim of right in his plaint.

A case, decided by MITTER, J., was referred to—*Mussamut Dhurjobutty Chowdhrain* v. *Chamroo Mundul* (1), in which that learned Judge appears to have held, under circumstances somewhat resembling the present, that the case did not come within s. 27 of the Rent Law, because the suit was brought to establish the plaintiff's title. The case is not very fully reported, and it is very probable that it did involve some claim of title. It was upon that ground entirely that the decision proceeded, and it is, therefore, distinguishable from this case, because here we consider that no claim of title was involved.

The judgments of the lower Courts will, therefore, be reversed, and the plaintiff's claim will be dismissed.

Appeal allowed.

(1) 25 W. R., 217.

Before Mr. Justice Mitter and Mr Justice Norris.

MONOHUR LALL AND OTHERS (DEFENDANTS) *v.* GOURI SUNKUR (PLAINTIFF).*

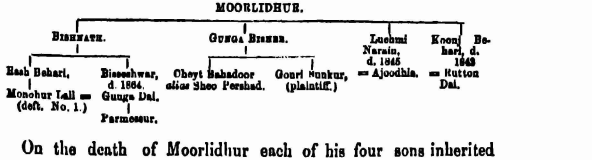
1882 *July* 17.

Civil Procedure Code (Act VIII of 1859, *ss.* 7, 8, 9, 10)—*Cause of action, including whole claim arising out of—Mesne profits, Suit for—Possession, Suit for.*

Under s. 7, read with ss. 8, 9, and 10 of Act VIII of 1859, a plaintiff suing for mesne profits of land is not precluded from afterwards maintaining a suit for possession of such land.

Pratap Chandra Burua v. *Rani Swarnamayi* (1), commented on.

THIS suit, in which the defendants are persons in possession, namely Monohur Lal and three others, claiming title through him, was instituted on the 24th September 1879, for possession of the difference between a one-third and a one-fourth share in all property left by the plaintiff's uncle Koonj Behari, except in mouzah Balwa, and of the difference between a two-thirds and a one-fourth share in mouzah Balwa, and for a declaration of the plaintiff's title to such larger shares. The property in dispute belonged to the plaintiff's grandfather Moorlidhur. The following is a genealogical table of his descendants :—



On the death of Moorlidhur each of his four sons inherited a four-anna share. Luchmi Narain, the third son, died in 1845 without issue, leaving his widow Ajoodhia him surviving. Ajoodhia died some time before the year 1864. Koonj Behari also died without issue in the year 1842, leaving him surviving a widow Rutton Dai. On the death of Ajoodhia, Rash Behari, the eldest son of

* Appeal from Original Decree No. 31 of 1881, against the decree of Baboo Poreshnath Banerjee, Subordinate Judge of Patna, dated 30th of September 1880.

(1) 4 B. L. R., F. B., 113.

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Bishnath, retained possession of the whole of Luchmi Narain's share under ticca leases, &c., alleged to have been executed by Ajoodhia.

Some time after the death of Koonj Behari, Rash Behari similarly took possession of his share under a deed of gift executed by his widow Rutton Dai.

On the 5th March 1864, Gouri Sunkur, the plaintiff in this suit, brought an action for the recovery of possession of a four annas share of the properties left by his uncles Luchmi Narain and Koonj Behari, against Rash Behari as the principal defendant, making his brother Cheyt Bahadoor, his cousin Bisseshwar, and Rutton Dai, the widow of Koonj Behari, *pro forma* defendants. Ajoodhia the widow of Luchmi Narain was not then alive. One of the reliefs sought for in this suit was the cancellation of the deed of gift alleged to have been executed by Rutton Dai.

While this suit was pending Bisseshwar died. On the 10th January 1865, Gouri Sunkur obtained a decree in this suit. Rash Behari appealed to the High Court against that decree. The High Court, on the 29th November 1865, affirmed the decree, with this modification, that Rash Behari was entitled to retain possession of the share of the estate transferred to him by Rutton Dai, widow of Koonj Behari, during the lifetime of the said Rutton Dai.

On the 28th January 1865, a similar suit was brought by Gouri Sunkur's brother, Cheyt Bahadoor, and on the 11th December 1866 a similar decree was made in that suit.

In the year 1867, Purmessur, son of Bisseshwar, brought a similar suit against Rash Behari and other members of the family, and obtained a similar decree in the Court of First Instance; but on appeal the High Court modified it, dismissing his suit in respect of Koonj Behari's estate.

Rutton Dai, the widow of Koonj Behari, died on the 10th May 1870. On her death the plaintiff, Gouri Sunkur, made an application to execute his decree for possession in respect of Koonj Behari's estate; he was, on the admission of Rash Behari's son, Monohur Lall (Rash Behari having died in the meantime) put in possession of a one-fourth share of that estate which had been decreed to him in his suit. The plaintiff thus obtained possession of a one-fourth share of Koonj Behari's estate in the year 1874.

The plaintiff Gouri Sunkur then, on the 30th May 1874, brought a suit against Monohur Lall, the defendant No. 1, for mesne profits in respect of a one-fourth share of the estate of Koonj Behari from the date of the death of Rutton Dai to the date of his recovery of possession thereof. In the plaint in that suit he stated that at the time when his first suit was brought, Bisseshwar having been alive, he had claimed only a one-fourth share of Koonj Behari's estate; but Bisseshwar died during the lifetime of Rutton Dai, and therefore on her death the estate of Koonj Behari devolved on his surviving brother's sons, namely, himself, his brother Cheyt Bahadoor, and his cousin Rash Behari. The plaintiff further alleged in that plaint that he was entitled under the Hindu law of inheritance to one-third of Koonj Behari's estate, but as he was in possession of one-fourth only he would bring a suit for the difference. This wassilat suit was decreed on the 27th August 1865.

On the 28th December 1872 the rights of Cheyt Bahadoor in one of the mouzahs in dispute, *viz.*, Balwa, were sold in execution of a decree and purchased by the plaintiff Gouri Sunkur.

An application was made by the plaintiff Gouri Sunkur for registration of his name under the Land Registration Act, in respect of a one-third share of the estate of Koonj Behari in mouzahs other than Balwa, and in respect of a two-thirds share in that mouzah; this application was opposed by the defendant Monohur Lall, who alleged that the plaintiff was entitled only to a one-fourth share; the order in the Land Registration Act was passed in accordance with the defendant's contention.

The lower Court having made a decree in the plaintiff's favour for the relief sought in the present suit, the defendants appealed to the High Court on the ground, amongst others, that the present suit was barred under s. 7 of Act VIII of 1859.

Baboo *Rajender Nath Bose* for the appellants.

Mr. *M. L. Sandel* for the respondent.

The judgment of the Court (MITTER and NORRIS, JJ.) was delivered by

MITTER, J., who after stating the facts as above, continued:

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"The main ground urged in appeal by the defendants, appellants, is that the present suit is barred under the provisions of s. 7 of Act VIII of 1859. It is contended that the present suit is based upon the same cause of action upon which the suit for possession during the lifetime of Rutton Dai, and the suit for wassilat after her death, were brought.

As regards the first of these two suits, it is quite clear that it was not brought upon the same cause of action upon which the present action is based. The succession to the estate of Koonj Behari devolved upon the plaintiff, respondent, and his other co-heirs on the death of Rutton Dai; therefore, the cause of action of the present suit accrued on the date of her death, *viz.*, 10th May 1870; consequently it is not identical with the cause of action of the suit which the plaintiff, respondent, brought during the lifetime of Rutton Dai. The cause of action in this latter suit was that the plaintiff, respondent, as one of the presumptive heirs of Koonj Behari after the death of his widow Rutton Dai, was entitled to have the property alienated by her restored back on the ground of waste committed by the widow; therefore, the contention raised before us upon the basis of the first of these two suits has no validity.

But the question is not altogether free from difficulty as regards the other suit. It was brought after the death of Rutton Dai; it was also brought upon the same title upon which the present suit is founded; and if s. 7 had stood alone, it would have been difficult to say that the claim for the mesne profits of the estate of Koonj Behari, and the claim for the recovery of that estate, were not parts of a claim arising out of one cause of action, namely the death of Rutton Dai and the unlawful possession of the whole of Koonj Behari's estate by the defendants, appellants, to the exclusion of the other heirs. But s. 7 must be read along with the provisions of the following three sections, *viz.*, 8, 9 and 10. It has been uniformly held, with reference to these sections, that a plaintiff, suing for possession of land first, is not precluded from maintaining a second action for mesne profits of such land.

In the Full Bench decision of *Protap Chandra Burua* v.

Rani Swarnamayi (1) the plaintiff first brought a suit for possession of land in the month of April 1855 with mesne profits from the date of Ouster, *viz.*, 14th September 1852 to the date of suit. A decree was passed in his favour for the possession of the land only on the 18th Feburary 1863. In execution of that decree he obtained possession on the 25th December 1864, and on the 28th August 1865 he brought a second suit for mesne profits from the 14th September 1852 to the 25th December 1864. The Division Bench, before which the case was first heard, held that the claim for mesne profits from September 1852 to April 1855 was clearly barred by limitation, and as regards the remaining portion of the claim, the learned Judges who constituted the Bench were inclined to the opinion that it was barred under the provisions of s. 7 of Act VIII of 1859. But as there were decisions conflicting with their view, they referred the point to a Full Bench. Peacock, C.J., in delivering the judgment of the Full Bench, said: "Section 7 says that every suit shall include the whole of the claim arising out of the cause of action. The plaintiff's claim to mesne profits from the time he might obtain a decree to the time he might obtain possession under that decree, was not a claim which he had at the time when he filed his plaint; and he could not therefore include that claim for mesne profits in his plaint. Independently of that, I think that he was not bound to include his claim for mesne profits in the suit for possession.

"Section 10 of Act VIII of 1859 is very clear upon that point, &c., &c., &c."

It appears to us that this decision was based upon two grounds: 1st, that assuming s. 7 was applicable, the suit was maintainable, because the claim for mesne profits from the date of decree to the date of recovery of possession had not arisen when the first suit was brought; and, secondly, s. 7 was not applicable by reason of the provisions of s. 10 (see also upon this point *Chowdhry Imdad Ali* v. *Boonyad Ali* (2); and *Mussamut Rookminee Kooer* v. *Ram Tohul Roy* (3). The present is the converse of these cases. There, suits for land were brought first, and then the suits for mesne

(1) 4 B. L. R., F. B., 113. (2) 14 W. R., 92. (3) 21 W. R., 22.

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profits were brought. Here, the suit for mesne profits was brought first. But this difference is immaterial, so far as the question of construction of ss. 7 to 10 is concerned. We are, therefore, of opinion that the contention of the appellant is not valid. We, therefore, dismiss the appeal with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Wilson and Mr. Justice O'Kinealy.

1882 *August* 31.

THE EMPRESS *v.* HURRO KOLE.*

Jurisdiction—Appeal—Revision—Offence committed out of British India.

The High Court has no power, either by way of appeal or revision, to interfere with a sentence passed by the Superintendent of the Tributary Mehals when exercising jurisdiction over offences committed in Mohurbunj, a place not situated within the limits of British India.

Empress v. *Keshub Mahajun* (1); and *Hursee Mahapatro* v. *Dinabundhu Patro* (2), referred to.

In this case the appellant, Hurro Kole, was charged with murder by intentionally causing the death of one Ghashye Kole on the 6th October 1881, at Higli, in Mohurbunj. The prisoner was tried and convicted by the Superintendent of the Tributary Mehals, at Balasore, on the 1st of March 1882, and sentenced to transportation for life. He thereupon appealed to the High Court.

No one appeared to argue the case.

The judgment of the Court (WILSON and O'KINEALY, JJ.) was delivered by

WILSON, J.—This is an appeal from a conviction by the Superintendent of the Cuttack Tributary Mehals. The offence was committed in Mohurbunj. The accused is a native of Mohurbunj. The trial took place at Balasore. It has been decided by a Full Bench that Mohurbunj is not a part of British India—*The*

* Criminal Appeal No. 166 of 1882, against the order of A. Smith, Esq., Superintendent, Tributary Mehals, Cuttack, dated the 1st March 1882.

(1) I. L. R., 8 Calc., 985. (2) I. L. R., 7 Calc., 523.

Empress v. Keshub Mohajan (1). The Superintendent of Tributary Mehals and his Assistant exercise jurisdiction over offences committed in those mehals, including Moburbunj, under regulations and instructions which were examined in the case just referred to and in *Hursee Mahapatro v. Dinabundhu Patro* (2).

We have not now to consider whether the jurisdiction as exercised is in accordance with law or not, but only whether we have any power to interfere with the decision of the tribunal. We think this Court has no such power, either by way of appeal or of revision. The Letters Patent now in force (those of 1865) by s. 27, make this Court a Court of Appeal "from the Criminal Courts of the Bengal Division of the Presidency of Fort William and from all other Courts subject to its superintendence." Those words, according to the well-known rule of construction, must mean British Indian Courts, that is to say Courts established in and for British India. Section 28 makes the Court "a Court of reference and revision from the Criminal Courts subject to its appellate jurisdiction." This section, therefore, carries the case no further. The Criminal Procedure Code gives an appeal to this Court only from Sessions Judges and certain other specified officers, all of whom are British Indian officers and exercise their functions in and for British India. The revisional powers given by the Code are likewise limited to the Courts subordinate to this Court, which, for the reasons already pointed out, must be restricted to British Indian Courts. This appeal must be rejected on the ground that we have no power to entertain it.

Appeal dismissed.

(1) I. L. R., 8 Calc, 985. (2) I. L. R., 7 Calc., 523.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice McDonell, Mr. Justice Wilson, Mr Justice Tottenham and Mr. Justice Field.

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HURO PROSAD ROY (PLAINTIFF) *v.* KALI PROSAD ROY (DEFENDANT).*

Civil Procedure Code (Act X of 1877), s. 326—Scheme for satisfying decree—Stay of public sale of attached property.

Where the Collector has applied to the Court under s. 326 of the Civil Procedure Code, proposing a scheme for the payment of decretal money in order to avoid a sale of attached property, it is in the discretion of the Court to authorize the Collector or not, as it thinks fit, to provide for the satisfaction of the decree in the manner proposed; and the Court is bound to hear any objections which may be made by the decree-holder to the feasibility of the proposed scheme, and any evidence that may be offered, in support of those objections; and if after hearing the decree-holders objections, and the evidence which may be offered in support of them, the Court is not fully satisfied that the proposal is feasible, or that it can in all reasonable probability be carried out within the specified period, the Court ought, in the exercise of its discretion, to refuse its sanction.

THE facts of this case, so far as they are material, are fully set forth in the order of reference, which was as follows:—

An important question has arisen in this case as to the proper construction of s. 326 of the Civil Procedure Code; and as there appears to be some difference of opinion upon the subject, we think it right to refer the point to a Full Bench.

After 50 years' litigation, the plaintiff, Huro Prosad Chowdhry, had at last succeeded in obtaining a decree in the Privy Council against the defendants Kali Prosad Roy Chowdhry and others, for a sum of Rs. 36,000, and a further sum of Rs. 6,000 for interest.

Execution upon this judgment was first issued by the decree-holder in the 24-Pergunnahs; but as there was little or no property there to satisfy the amount, the proceedings were transferred to the District Court of Jessore, where the Judge ordered certain properties of the judgment-debtor to be sold on the 1st of April 1880.

* Rule No 988 of 1881.

On the 30th of March 1880 (two days before the sale), an application was made by the Collector of Jessore, under s. 326 of the Civil Procedure Code, proposing a scheme for the payment of the decretal money within eight years.

The Subordinate Judge made an order approving of this scheme, but the order was afterwards set aside upon a point of law upon application to this Court.

Upon this, the Collector proposed an amended scheme, which was also approved by the Subordinate Judge, for payment of the debt within ten years; but that was again set aside by an order of this Court.

The Collector then proposed a third amended scheme to the Subordinate Judge, proposing to pay the decretal debt within thirteen years; and on the hearing of this application, the decree-holder (amongst other objections) contended that the scheme of the Collector was not feasible, and stated that he was prepared to prove by evidence that, having regard to the real income of the property, it was impossible that the scheme could be carried out within the thirteen years period.

The Subordinate Judge, however, overruled the objection upon the ground that "*the Court in a matter of that kind ought to take the Collector's statement of the scheme as a sufficient guarantee for its fulfilment*," and that in case the Collector should fail to fulfil the terms proposed, the decree-holder would be at liberty to move the Court to reconsider its order.

The Subordinate Judge then made an order sanctioning the Collector's scheme.

Upon this, a rule was obtained before the First Bench, calling upon the judgment-debtors and the Collector to show cause why the last-mentioned order of the Subordinate Judge should not be set aside, upon the ground that he had accepted the representation of the Collector without inquiry, and without allowing the decree-holder to show, by argument or evidence, that the scheme of the Collector was not feasible.

Upon this rule coming on to be argued, it was contended on behalf of the Collector and the judgment-debtors:—

First.—That according to the true meaning of s. 326, the Court was bound to accept the representation of the Collector

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as true, without any inquiry at all as to whether the scheme which he proposed is reasonable or feasible; and

Secondly.—That at the most the Court could only inquire as to whether the period within which satisfaction of the decree was to be obtained, is a reasonable one.

It was further contended that if the scheme upon the face of it appeared feasible, the decree-holder had no right to call evidence to show that it was not so.

In support of this view, we were referred to a decision of Mr. Justice WHITE and Mr. Justice FIELD, dated 9th September 1880, in which those learned Judges had apparently expressed an opinion, that it was not competent for the judgment-creditor to go into evidence to contest the feasibility of the Collector's scheme.

On the other hand, it was contended by the decree-holder that the Court was bound to make inquiry into the feasibility of the scheme, and to allow the decree-holder to call evidence.

We were rather disposed to think that the Subordinate Judge was wrong in refusing to allow the decree-holder to go into evidence; and we had great doubt whether the Court had any right, having once sanctioned the scheme, to reconsider its order.

But having regard to the doubtful language of the section, and the opinion which had been expressed by Mr. Justice White's Bench on a previous occasion, we have thought it right to refer the matter to a Full Bench.

The questions which we desire to refer are—

First.—Whether under s. 326 of the Code, the Court is bound to accept the representations of the Collector with regard to the scheme which he proposes as being reasonable and feasible?

Second.—Whether upon such representation being made to the Court, the decree-holder is at liberty to satisfy the Court, if he can, by argument and evidence, that the scheme proposed by the Collector is not feasible; or that satisfaction of the decree cannot be made within the period mentioned by the Collector?

Mr. *Evans* in support of the rule.

The *Advocate General* (Officiating, Mr. *Phillips*) showed cause.

The following judgments were delivered by the Full Bench.

GARTH, C.J., (MCDONELL, WILSON and TOTTENHAM, JJ., concurring)—We think that under s. 326, it is in the discretion of the Court to authorize the Collector or not, as it thinks fit, to provide for the satisfaction of the decree in the manner which the Collector recommends, and for the purpose of effectually exercising that discretion we consider that the Court is bound to hear any objections which may be made by the decree-holder to the feasibility of the proposed scheme, and any evidence that may be offered in support of those objections.

It is clear that under s. 320, the word "may" is used in a discretionary sense only, and it would appear to be used in the same sense in the intervening sections; and there certainly seems good reason why the Court should enquire closely into the feasibility of the Collector's proposal, seeing that its effect would be to deprive the decree-holder of the right, which the law gives him, of executing his decree, and not only so, but to protect the debtor's property during all that time from execution at the suit of other creditors.

If upon hearing the decree-holder's objections, and the evidence which may be offered in support of them, the Court is not fully satisfied that the proposal is feasible, or that it can in all reasonable probability be carried out within the specified period, the Court ought, in the exercise of its discretion, to refuse its sanction.

FIELD, J.—Section 326 of the Code of Civil Procedure is as follows: "When, in any local area in which no declaration under s. 320 is in force, the property attached consists of land or of a share in land, and the Collector represents to the Court that the public sale of the land or share is objectionable, and that satisfaction of the decree may be made within a reasonable period by a temporary alienation or management of the land or share, the Court may authorize the Collector to provide for such satisfaction in the manner recommended by him, instead of proceeding to a sale of the land or share." In the case which has led to the present reference, the Collector proposed two schemes, both of which were set aside for reasons which it is unnecessary to refer to. The Collector then proposed a third scheme, and the decree-

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holder alleged that this scheme was not practicable, and asserted that if he were allowed to do so, he could prove this allegation by evidence.

The Subordinate Judge was of opinion that he was bound to take the Collector's statement of the scheme, and he declined to receive the evidence offered by the decree-holder.

Now, in order to understand the provisions of s. 326, it is, I think, necessary to refer briefly to the preceding ss. 320 to 325 C. Section 320 provides as follows : "The local Government may, with the sanction of the Governor-General in Council, declare, by notification in the Official Gazette, that in any local area the execution of decrees in cases in which a Court has ordered any immovable property to be sold, or the execution of any particular kind of such decrees, or the execution of decrees ordering the sale of any particular kind of, or interest in, immovable property, shall be transferred to the Collector;" and then follow certain provisions which enable the Collector to proceed in a particular manner, in order to the execution of any decree that has been so transferred.

Now, the object of these provisions is well known. In different parts of India, the effect of sales in execution of decrees was to transfer landed estates from the old families to modern speculators. A strong opinion was entertained by certain Members of the Government of India, that these results of the administration of civil justice were impolitic and inexpedient; and it was suggested that some procedure might be devised by which the Chief Executive Officer of the district would be enabled to liquidate the debts of encumbered land-holders without the immediate sale of their estates, and so to preserve the old landed gentry of the country. The provisions of ss. 320 to 325 C. were inserted in the Code of Civil Procedure, in order to give effect to these suggestions. Now, there can be no doubt that when the local Government makes a notification under s. 320, in regard to any local area, the execution of all decrees of the class specified in that notification, is transferred from the Civil Court to the Collector, and the Civil Court has no option whatever in the matter. Then comes s. 326, and this section is clearly intended to provide for isolated cases, in which the Collector is of opinion that the

public sale of the land is objectionable, and that satisfaction of the decree may be had, within a reasonable period, by a temporary alienation or management of the land. There is an important difference between the language used in s. 326 and the language used in preceding sections, which latter is imperative. It appears to me that the words in s. 326, "Court may authorize," are not imperative, but leave a discretion to the Civil Court. If then the Court has a discretion, that discretion can only properly be exercised upon materials placed before it, and I think that it is open to the decree-holder to place those materials in the shape of evidence before the Civil Court, and to satisfy the Court, as well by evidence as by argument, that the proposal of the Collector is not feasible or practicable. In this view, I would answer both the questions referred to the Full Bench in the affirmative.

PRIVY COUNCIL.

NILMONI SINGH DEO (DECREE-HOLDER) *v.* TARANATH MUKERJEE, (JUDGMENT-DEBTOR)

[On appeal from the High Court at Fort William in Bengal]

P. C.*
1882.
May 18.

Superintendence of the High Court—24 and 25 Vic., c. 104, s. 15—Execution of decrees for rent—Act X of 1859, ss. 23, 77 and 160—Civil Procedure Code (Act VIII of 1859) ss. 284, 294—(Act X of 1877); ss. 223, 228.

Whether a decree for rent, under Act X of 1859, made in one district, can be transferred to another for execution, is a question which the High Court can decide in the exercise of its "superintendence over all Courts subject to its appellate jurisdiction," under 24 and 25 Vic., c. 104, s. 15. Decrees for rent made by the Collector under s. 23 of Act X of 1859 can be executed by a Civil Court to which they may be transferred under the sections of the Code of Civil Procedure relating to "the execution of a decree out of the jurisdiction of the Court by which it was passed."

Appeal from an order of the High Court, (7th July 1880), made in exercise of its power of superintendence over all Courts subject to its appellate jurisdiction under 24 and 25 Vic., c. 104, s. 15. This stayed proceedings upon an order made by the Deputy

* *Present:* SIR B. PEACOCK, SIR R. COLLIER, SIR R. COUCH, and SIR A. HOBHOUSE.

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Commissioner of Manbhum on 11th March 1872 as Collector of the District, transferring a decree for rent made in that district to another for execution; it also cancelled a similar order dated 29th May 1879.

The respondent held for some years a patni in the district of Manbhum under a grant made in 1861 by the appellant Rajah Nilmoni Singh; and during his tenure two decrees for rent—one in 1863 and another in 1864—were made against him under Act X of 1859, s. 23, in favor of the Rajah. Afterwards the respondent having ceased to hold the patni in that district, in which also unsuccessful attemp ts had been made to execute the above decrees, application was made by the decree-holder for a transfer of them to another district. On this the Deputy Commissioner of Manbhum as Collector of the district, on the 11th March 1872, made the earlier of the two orders, in regard to which the question on this appeal arose. This order referring to the application made for execution of the decrees for rent in the district of Nuddea, in which district it was stated that the judgment-debtor then resided and had property, recorded that the Deputy Commissioner found nothing in Act X of 1859 to prevent such a transfer, and directed that a copy of the proceedings should be sent to the Judge of Zillah Nuddea with a view to the amount of the decrees being realized.

The decree-holder not having obtained satisfaction in Nuddea again applied to the Deputy Commissioner for a transfer of his rent decrees under s. 223 of Act X of 1877 in May 1879. He applied for execution of them in twelve other districts which he named, undertaking that execution should be issued in not more than one at a time. The second of the two orders was thereupon made on the 27th May 1879, and copies of the rent-decrees, with certificates of their non-satisfaction, were sent to the different districts.

The respondent, after attempting in vain to obtain the withdrawal of the above orders, petitioned the High Court to cancel them on the ground that they had been made by the Deputy Commissioner of Manbhum in excess of his jurisdiction as Collector. On the 7th June 1880 a Divisional Bench (MITTER

and MACLEAN, JJ.) stayed proceedings on the order of 1872, and cancelled that of 1879, giving judgment as follows :—

"If the orders complained of are passed without jurisdiction, we think we have the power to interfere under section 15 of the Act of Parliament constituting this Court (See *In the matter of the petition of Gobind Koomar Chowdhry* (1).

"We are also of opinion that a Revenue Court under Act X of 1859 has no power to transfer a decree of its own to be executed by another Court within the jurisdiction of the latter. Such power cannot exist without an express provision of the law granting it. It is clear, therefore, that both the orders complained of are such as the Deputy Commissioner of Manbhum had no authority to pass under Act X of 1859, or any other law applicable to rent suits in that district.

"But one of the orders was passed so far back as the 11th March 1872, and we understand that sales and other proceedings have been held and completed under it without any objection on the part of the applicant. Under these circumstances, we do not think it right, in the exercise of our extraordinary power under s. 15 of the Statute referred to above, to quash it now.

"The other order complained of is comparatively of a recent date, *viz.*, the 27th May 1879, and from the time the petitioner came to know of it he has been diligently endeavouring to have it set aside. Besides, if proceedings be allowed to proceed in accordance with it, it may unnecessarily involve the parties to this suit (and possibly also third parties) in profitless litigation. Under these circumstances, we think it right to exercise our extraordinary jurisdiction in respect of this order. We accordingly set it aside, and direct the Deputy Commissioner to recall the certificates of non-satisfaction from the District Courts to which they have been sent, informing them at the same time that the order under which they were sent has been reversed.

"We are informed by the parties that proceedings are still pending in the District Court of Nuddea under the first-mentioned order. Although we decline to quash it formally on the grounds mentioned above, we have yet expressed our opinion that it was

(1) B. L. R. Sup. Vol., 714. S. C., 7 W. R., 520.

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also *ultra vires*. We think, therefore, that the District Court of Nudden should be informed that it should not proceed further in the matter, and return the record back to the Court of the Deputy Commissioner of Manbhum."

On this appeal—

Mr. *R. V. Doyne* appeared for the appellant.

Mr. *J. F. Leith, Q.C.*, Mr. *T. H. Cowie, Q.C.*, and Mr. *C. W. Arathoon* for the respondent.

For the appellant it was argued that, assuming this question to fall within the High Court's jurisdiction under s. 15 of 24 and 25 Vic., c. 104, it had been wrongly held that the Collector had acted without legal authority in transferring the rent-decrees for execution. On a review of the past state of the law on this point, it was contended that so long as suits for arrears of rent were brought (Regulation V of 1831) before the ordinary Court as civil suits, the law relating to the execution of rent-decrees, as well as that relating to other decrees, was given by Act XXXIII of 1852, until its repeal when superseded by the provisions of the Code of Civil Procedure, by Act X of 1861, the repealing Act. Originally a rent-decree might have been treated like another decree, and the Deputy Commissioner's order of March 1872 correctly stated that there was nothing in Act X of 1859 to alter the law in this respect.

The latter enactment in s. 23 providing that all suits for rent should be cognizable by the Collector, did not alter the law relating to the execution of decrees out of the jurisdiction of the Courts by which they were passed. The Code of Civil Procedure, as enacted in Act VIII of 1859, was extended to Manbhum, by notification under s. 385, in June of that year; and the contention was that the procedure provided in ss. 284—296 for such execution superseded the former law. The High Court had taken for granted that these sections were inapplicable, and this was the error in the judgment under appeal. If, however, that Court had correctly supposed that the provisions of the Code on this point were inapplicable, then the previously existing law should be held to prevail. The latter view was, however, not the correct one, which, in effect, was that the sections of the Code had come

into force with reference to the execution of rent decrees out of the jurisdiction of the Collectors making them.

For the respondent it was argued that the judgment of the High Court was correct, there being neither express language conferring the power to transfer rent-decrees from district to district for execution, nor any intention, apparent upon the construction of Acts VIII of 1859 and X of 1859, to confer this power. Rent suits had been made cognizable by the Collector by Act X after Act VIII had become law; so that Act VIII would not, of its own force, apply to the proceedings of Courts afterwards established; nor did Act X refer generally to the procedure of Act VIII. On the contrary it contained special provisions on the subject of procedure, thereby furnishing a presumption against the intention to supplement its sections by any implied reference to s. 284 *et seq.* of Act VIII, and showing what appeared in several parts of Act X (to which reference in detail was made) *viz*, that rent suits were not treated as "civil" suits.

Mr. *R. V. Doyne* was not called upon to reply.

Their Lordships' judgment was delivered by

SIR A. HOBHOUSE.—The question presented to their Lordships in this appeal is whether the Deputy Commissioner of Manbhum who has made decrees in rent suits under the Bengal Rent Act No. X of 1859, can transfer those decrees for execution into another district. That officer possesses the jurisdiction conferred on Collectors of Land Revenue, and having made decrees in exercise of such jurisdiction, has further proceeded to make two orders transferring two decrees for execution. The High Court in the exercise of their power of revision, have substantially quashed his orders; in point of form, they have quashed one of the orders; and they have stayed proceedings on another. It is hardly necessary to enter into the details of the litigation. The High Court have decided that the Deputy Commissioner, as Judge of the Rent Court of Manbhum, had no authority to pass the orders under Act X of 1859, or any other law applicable to rent suits in that district.

A question was raised with respect to the jurisdiction of the High Court to entertain this question in revision at all. Their Lordships do not think it necessary to say anything upon that

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point, except that they entirely agree with the view taken by the High Court of their own jurisdiction.

The other question depends upon the construction of Act X of 1859. That Act was passed for the purpose, among other things, of transferring suits for arrears of rent to the jurisdiction of the Collectors of Land Revenue; and it provided by s. 23, paragraphs 4 and 7, that all such suits "shall be cognisable by the Collectors of Land Revenue, and shall be instituted and tried under the provisions of that Act, and, except in the way of appeal, as provided in this Act, shall not be cognisable in any other Court, or by any other officer, or in any other manner."

It is not contended on behalf of the appellant that Act X of 1859 in any express way gave to the Collector the power of transfer which has been exercised. Neither is it contended for the respondent, that the words which have been read would, without more, prevent the provisions of Act VIII of the same year from applying to the execution of a Collector's decrees beyond the jurisdiction of his Court. The contention of the respondent is, that there is something in the language of Act X of 1859 which excludes this power from the jurisdiction of the Collector sitting as the Judge of the Rent Court established by that Act. For that purpose the respondent's counsel refer to a number of sections which may be illustrated by a single one. Section 77 deals with cases in which a third party appears to claim title in a rent suit; it gives the Collector certain powers of deciding the question before him, and then contains this proviso: "The decision of the Collector shall not affect the right of either party who may have a legal title to the rent of such land or tenure to establish his title by suit in the Civil Court." There are a number of other sections of similar frame; and the contention is, that the expression "Civil Court" is used in all those sections in such a way as to show that the framers of the Act X of 1859 did not consider that the Rent Courts established by that Act are Civil Courts.

It must be allowed that in those sections there is a certain distinction between the Civil Courts there spoken of and the Rent Courts established by the Act, and that the Civil Courts referred to in s. 77 and the kindred sections, mean Civil Courts exercising all the powers of Civil Courts, as distinguished from the

Rent Courts, which only exercise powers over suits of a limited class. In that sense there is a distinction between the terms; but it is entirely another question whether the Rent Court does not remain a Civil Court in the sense that it is deciding on purely civil questions between persons seeking their civil rights, and whether, being a Civil Court in that sense, it does not fall within the provisions of Act VIII of 1859. It is hardly necessary to refer to those provisions in detail, because there is no dispute, but that, if the Rent Court is a Civil Court within Act VIII of 1859, the Collector has, under s. 286, the power of transferring his decrees for execution into another district.

The consequence of holding, as the High Court have held, is, that wherever Act X of 1859 applies, persons seeking their rent against a tenant who is insolvent in the district in which he is sued, have absolutely no remedy against him, though he may be possessed of great wealth in another district. No reason has been assigned, or so much as suggested, why such a distinction should exist between a person who is claiming a debt, founded on rent, and a person who is claiming a debt, founded on any other transaction. The distinction does not exist in any other part of India, neither indeed does it exist in those provinces of Bengal in which Act X of 1859 has been repealed, and the Bengal Act VIII of 1869 has taken its place. Therefore, although it is not impossible that the Legislature should have intended to establish in Manbhum and adjacent districts a distinction between claims for rent and all other claims which does not exist elsewhere, it requires very clear and cogent evidence on the face of the enactments to support the conclusion that they really do intend such a distinction.

That consideration is somewhat emphasised by referring to Act XXXIII of 1852, which was an Act passed to facilitate the enforcement of judgments in places beyond the jurisdiction of the Courts pronouncing the same. It provides that with respect to all Courts—not making a distinction between one Court and another, but with respect to all Courts—judgments may be enforced in the manner provided in the Act, *viz.*, by a transfer of the judgment out of the district of the Judge who pronounces it, into the district of some other Judge within whose jurisdiction

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the debtor possesses property. It it true that in this Act it is said that the word "judgment" means a judgment in a civil suit or proceeding. But suits for the recovery of rent are civil suits or proceedings; and nothing can be clearer on the face of this Act than that the Legislature intended that everybody, who obtained a decree in a Court of Justice, should have a remedy against his debtor, wherever the property of that debtor might be.

The provisions of the Act of 1852 are substantially repeated in Act VIII of 1859; and though that Act speaks of Civil Courts, and not all Courts as Act XXXIII of 1852 does, yet the intention expressed is the same, *viz.*, that all Courts entertaining civil suits of any kind should have this power of transferring their decrees for execution into another district. We find that Act XXXIII of 1852 was repealed in the year 1861, and it is repealed as being simply obsolete, the only reason expressed for repealing it being that Act VIII of 1859 had been passed. If Act VIII of 1859 covered the same ground as Act XXXIII of 1852, the earlier Act had become useless, and might be swept out of the Statute Book. But the earlier Act would not have become useless unless the later Act covered the same ground.

In the opinion of their Lordships it is clear that, looking outside Act X of 1859, no intention of making a distinction between rent suits and other suits in respect to the point now under consideration can be ascribed to the Legislature.

Turning to Act X of 1859, the preamble recites that "it is expedient to re-enact, with certain modifications, the provisions of the existing law in connection with demands of rent, to extend the jurisdiction of Collectors, and to prescribe rules for the trial of such questions." It was pointed out by Mr. Doyne that the particular process now under consideration was not the trial of any question regarding rent. But when we look at the provisions of the Act, it is clear that they go beyond the trial of such questions, and provide for the execution of decrees. At the same time the scope of the Act appears to be only to provide for the execution of the decrees of the Collector within his jurisdiction. There is nothing in the Act which provides for any execution beyond his

jurisdiction, and there is nothing to forbid the conclusion that such executions are left to the operations of Act XXXIII of 1852, or the corresponding portion of Act VIII of 1859.

Section 160 of Act X of 1859 has a bearing on this question. That section provides that an appeal from the judgment of a Collector or Deputy Collector shall lie to the zillah judge. But the zillah judge is a Civil Court to all intents and purposes. It was not disputed that if an appeal went from the Collector to the higher Court,—to the zillah judge or to the High Court,—and the decree of the Collector for rent was there affirmed, it would become the decree of a Civil Court, which could not be excluded from the operation of Act VIII of 1859. Then this consequence would follow, that the act of the parties would alter the nature of the decree; as long as the decree remains the decree of the Collector it is incapable of enforcement in any other district; but let the decree be affirmed by a Court of Appeal, and though it is between the same parties for the same subject matter, it then becomes enforcible in another district. It is very difficult to suppose that any such result as that could possibly have been intended by the Legislature.

These considerations lead to the conclusion that the Rent Courts, established by Act X of 1859, must be held to fall within s. 284 of Act VIII of the same year.

The result is, that their Lordships will humbly advise Her Majesty that the order of the High Court of the 7th July 1880 be set aside, and that it be ordered that the rule *nisi* of the 17th of May 1880, therein referred to, be discharged with costs. The respondent must pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellant, Messrs. *Lambert, Petch*, and *Shakespear.*

Solicitor for the respondent, Mr. *T. L. Wilson.*

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Maclean.

1882
April 14.

NARAIN ROY (DEFENDANT) *v.* OPNIT MISSER AND OTHERS (PLAINTIFFS).*

Right of Occupancy, Conditions necessary for acquiring—Non-payment of Rent—Beng. Act VIII of 1869, *ss.* 6, 22 *and* 52.

Two conditions only are necessary for the acquiring of a right of occupancy, *viz.*, (1), the cultivation or holding of land for a period of twelve years; and (2), that the person holding or cultivating the land should be a ryot.

The essential conditions of s. 6, Beng. Act VIII of 1869 are fulfilled without showing the payment of rent, that only being a condition necessary for the maintaining of the right when created.

In a suit brought to evict a tenant who had been in possession of certain land for a longer period than twelve years, when it was shown that rent had not been paid, and notice to quit had been given—

Held, that a right of occupancy had been acquired, and that the ryot had the power to prevent forfeiture under the provisions of s. 52, Beng. Act VIII of 1869.

THIS was a suit brought by the plaintiffs to evict the defendant and obtain khas possession of certain land after serving him with a notice to quit. The facts of the case are sufficiently stated in the judgment of the Court.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Shreesh Chunder Chowdhry* for the appellant.

Mr. *Branson*, Baboo *Chunder Madhub Ghose* and Baboo *Aubinash Chunder Banerjee* for the respondents.

The following judgments were delivered by the Court (MITTER and MACLEAN, JJ.)

MITTER, J.—The land in dispute in the possession of the defendant in this case amounts to 13 bighas out of an area of 78 bighas. The whole of the 78 bighas at the time of the thakbust in the year 1864, was the subject-matter of

* Appeal from Appellate Decree No. 1692 of 1880, against the decree of T. D. Beighton, Esq., Officiating District Judge of Shahabad, dated the 4th June 1880, affirming the decree of Baboo Bhugobutty Churn Mitter, First Munsiff of Arrah, dated the 7th February 1880.

a dispute between the Maharajah of Domraon on the one hand, and Dewan Ram Jewan Singh and Ram Coomar Singh on the other. The former claimed it as a part of Chuk Nowrunga, which is in the district of Gazeepore, and the latter as part of Baharwar in the district of Shahabad. The land in question was entered in the survey map as part of Baharwar.

The plaintiffs seek to evict the defendant after serving him with a notice to quit.

In September 1876 two suits were brought (one by the plaintiffs Nos. 1 to 4, and the other by the plaintiff No. 5), to recover possession of the whole of the aforesaid 78 bighas against the present defendant and several other persons. It was alleged by the plaintiffs that the defendants were trespassers, who had, under the color of some favorable orders passed by Criminal Courts, taken possession of the disputed land in the year 1283 (1876-77.)

The defendants took exception to the form of the suit on the ground that they were separately in possession of separate plots of land, and that they should not have been sued jointly in one suit. On the merits they alleged that they were in possession of the land as tenants and not as trespassers.

The plaintiffs obtained decrees in the lower Court which were confirmed on appeal. Two special appeals were preferred to this Court, and it was urged on behalf of the (defendants) appellants that the suits should have been dismissed both on the grounds of multifariousness as well as of limitation.

A Division Bench of this Court decreed these appeals. The learned Judges were of opinion that, although the suit, as framed, was bad on the ground of multifariousness, yet the defendants were not prejudiced thereby. They further held that as the defendants had held the land in dispute *as tenants* from 1265 (1858-59), limitation could not be set up against the landlords. But they dismissed the suits upon the ground that the defendants having been in possession as tenants could not be evicted by suits brought on the allegation that they were trespassers.

Then the plaintiffs joined together and brought this and five other suits giving to the defendants in Baisak 1286 (April-May 1879) notices to quit.

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The defendants contend that they are guzashta tenants, and therefore cannot be ejected otherwise than under the provisions of s. 52, Beng. Act VIII of 1869.

They allege that the whole of the 78 bighas is part and parcel of 200 bighas which formed their guzashta holding in Mouzah Sarenda, the property of the Maharajah of Domraon. That by the action of the river Ganges the 78 bighas remained submerged for a certain time. That when the land re-appeared Dewan Ram Jewan Singh and Ram Coomar Singh claimed it as appertaining to Baharwar, a mouzah contiguous to Sarenda. The Maharajah did not choose to claim it as part of Sarenda, but alleged that it appertained to Chuk Nowranga. The thakbust authorities ultimately decided the dispute in favor of the Dewans. That at the time of the settlement in the year 1868 it was treated as *towfir* land of Baharwar, and was settled with Dewan Ram Jewan and Ram Coomar, their (the defendants') rights as cultivators being recognized. They further alleged that they were always willing to pay to the settlement-holders the proper rent due, but it was not received, the landlords demanding higher rents. They admit that the rent was not deposited in Court as provided by law.

The Munsiff decreed the suits, holding that the defendants could not plead right of occupancy, as they, upon their own showing, had not paid any rent on account of the land in dispute either to the plaintiffs or to the *maliks*. The District Judge has upheld the decrees upon the ground that the defendants had failed to prove possession of the identical land now in dispute for more than twelve years.

It is clear that the ground taken by the District Judge is untenable. In the former suit this Court came to the conclusion that the defendants were, upon the judgments of the lower Courts, found to have been in possession of the land in dispute from 1265 (1858-59). Therefore the fact that they held the disputed land as tenants of the plaintiffs and their lessors for more than twelve years was conclusively found in the former litigation. The learned Counsel for the plaintiffs fairly admitted this; but he contended that the Munsiff's view of the law is correct, and that the payment of rent is a condition precedent to a ryot's acquiring a right of occupancy.

Several cases were cited in the course of the arguments; but it seems to us that none of them contain any authoritative ruling upon this point. They contain mere expressions of opinion supporting either the one or the other view of the question.

Neither have we been able ourselves to find any case in point. The question, therefore, comes on for decision for the first time before us.

We are of opinion that the decision of the Munsiff upon this point is not correct. Section 6, Act VIII of 1869, says: "Every ryot who shall have cultivated or held land for a period of twelve years shall have a right of occupancy in the land so cultivated or held by him, whether it be held under pottah or not, so long as he pays the rent payable on account of the same." It is clear from the language of the section that for the acquiring of the right of occupancy two conditions only are necessary, *viz.*, (1), the cultivation or holding of land for a period of twelve years; and (2), that the person holding or cultivating the land should be a ryot. No doubt in many cases the fact of non-payment of rent would be a valid ground for holding that the land was held not as a *ryot* but as a trespasser. But where, notwithstanding non-payment of rent, the holding or cultivation as a ryot is established for twelve years, the essential conditions of the section are fulfilled. The Munsiff was of opinion that the words "so long as he pays the rent payable on account of the same" show that the payment of the rent is an essential requisite for the acquiring of the right of occupancy. But he is mistaken in this, because the section says that a ryot, &c., shall have a right of occupancy so long as he pays the rent, &c., *i.e.*, a ryot who fulfils the two conditions mentioned above shall have a *right to occupy* the land (which means he cannot be evicted against his will) so long as he pays rent, &c. Therefore, the acquiring of a right of occupancy is dependent only upon the two conditions mentioned above, but the *maintaining* of it is further dependent upon another condition, *viz.*, payment of rent.

It was contended that it would be anomalous to hold that, although a right of occupancy may be acquired by a ryot who has not paid any rent, yet the moment it is acquired it would be extinguished if the payment of the rent be withheld. But

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reading s. 6 along with ss. 22 and 52 of the Rent Act, it would appear that the construction we adopt is not open to this objection. No doubt non-payment of rent works as a forfeiture of the rights of occupancy and renders a ryot, whether he has a right of occupancy or not, liable to be evicted (see s. 22). But a ryot having a right of occupancy cannot be evicted otherwise than in execution of a decree or order under the provisions of the Rent Act. Therefore, before a landlord can really reap the benefit of the forfeiture of a right of occupancy incurred by non-payment of rent, he must bring a suit to eject the ryot, and whenever such a suit is brought, the ryot will have the power to prevent the forfeiture by paying the arrears of rent under the provisions of s. 52. In this respect s. 52 makes no difference between an occupant and non-occupant ryot. Both have the same privilege of preventing eviction by the payment of the arrears of rent within a certain time.

For these reasons we are of opinion that the defendants are ryots possessing a right of occupancy. The decrees of the lower Courts are, therefore, set aside, and the plaintiffs' suit dismissed with costs throughout.

This judgment governs Ap. Ap. Decrees Nos. 1693 to 1697.

MACLEAN J.—I concur in dismissing the plaintiff's suits.

The position of the defendants as tenants since 1265 (1858-59) is conclusively established by the decision of this Court, dated 23rd July 1877; and, although there are some passages in that decision which may have led the plaintiffs to suppose that the defendants could not successfully set up a right of occupancy, I am unable to find authority for the proposition that an occupancy tenant (ryot) who, from any cause, has not paid his rent during his occupancy, can be ejected save under a decree for arrears. It seems clear to me that an occupancy right is "the right resulting from the connexion between the occupying tenant and the land which he occupies for a space of twelve years." *Narendra Narayan Roy Chowdhry* v. *Ishan Chandra Sen* (1). It is no doubt true that the right which is *acquired* by occupation as a tenant must be *maintained* by payment of rent, and

(1) 13 B. L. R., 274, see p. 289 per Jackson, J.

that on "the tenant failing to do so either from inability or from unwillingness the possession returns to the proprietor, the contract between him and his tenant being no longer in force; *Prosono Koomar Tagore* v. *Rammohun Doss* (1). But the law provides for the re-entry of the landlord in a particular manner, *viz.*, by ejectment upon a decree for arrears under the provisions of s. 22, Beng. Act VIII of 1869, subject however to the occupying tenant's privilege of avoiding the ejectment by payment within fifteen days of (s. 52, Beng. Act VIII of 1869.)

In this view of the law I find that the defendants are not liable to be ejected under notice.

Appeal allowed.

Before Mr. Justice Wilson and Mr. Justice Field.

FUTTEHMA BEGUM AND OTHERS (PLAINTIFFS) *v.* MOHAMED AUSUR AND OTHERS (DEFENDANTS).*

1882 *August* 1.

Second Appeal—Findings of fact—Procedure of the High Court—Interest—Mortgage bond.

Where the lower Appellate Court has clearly misapprehended what the evidence before it was, and has thus been led to discard or not give sufficient weight to important evidence, and to give weight to other evidence to which it is not entitled, and has thus been led not into any mere incidental mistake, but totally to misconceive the case, the High Court will interfere in second appeal, though it is not the ordinary course of procedure for it to interfere in such cases with any findings of fact which have been arrived at by the lower Appellate Court.

In a suit on a mortgage bond the plaintiffs are entitled to recover the agreed rate of interest without any deduction.

THIS was a suit for the recovery of Rs. 1,000 as principal, and a further sum as interset due on a bond executed by defendant No. 1, Mohamed Ausur, and his deceased wife Shurifunnissa Bibi on the 29th Choitro 1274, corresponding with the 10th April

* Appeal from Appellate Decree No. 496 of 1881, against the decree of T. M. Kirkwood, Esq., Judge of Mymensing, dated the 29th December 1880, reversing the decree of Baboo Nobin Chunder Ghose, Subordinate Judge of that district, dated the 29th March 1880.

(1) S. D. A., 1855, p. 14.

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1868, in favor of one Khotiza Sultan, the sister of the first two plaintiffs, and the mother's sister of the third plaintiff.

Originally separate suits were brought by plaintiffs Nos. 1 and 2 in the Bazitpur Munsiff's Court, in the year 1875, for their separate shares in this debt, of which they each claimed a 5½-anna share. The Munsiff in both cases decreed the claims, but the Subordinate Judge, on appeal, reversed that judgment, both on the merits and also on the ground that the plaintiffs could not sue separately, the bond being one and the same. The two plaintiffs then preferred a special appeal to the High Court, when all the proceedings were set aside, and they were directed to bring a joint suit, if so advised, on condition of their depositing the costs of the respondents in all Courts within two months. The Subordinate Judge's order was dated the 11th July 1876, and the High Court's conditional order was passed on the 3rd July 1877, and that was made absolute on the 3rd September following, all costs having been deposited. The present suit was instituted on the 30th May 1879 in the Court of the Subordinate Judge.

Several issues were raised by the defendants, and amongst them were the following:—

(1.) Whether the suit could be maintained in the absence of a certificate under Act XXVII of 1860.

(2.) Whether the suit was barred as *res judicata* by reason of the judgment of the Appellate Court in the former suit.

(3.) Whether, assuming the order to withdraw the former claim to have been unjustly made, a second fresh suit could lie.

(4.) Whether by reason of a portion of the money covered by one and the same bond not having been included in the former claim, the same should not now be held to have been relinquished.

(5.) Whether the suit was not barred by limitation.

(6.) Whether the plaintiffs were the rightful heirs of Khotiza Sultan, and whether the solenama was a *bonâ fide* document.

(7.) Whether the money bond was genuine, and the loan had been actually advanced.

The Subordinate Judge found that a certificate under Act XXVII of 1860 had been granted; that the suit was not barred as *res judicata* as the decision had been set aside by the High Court; and also decided the fourth and fifth

issues in favor of the plaintiffs. He also found that plaintiffs Nos. 1 and 2 were the heirs of Khotiza Sultan, who each of them taking a 5½-anna share had given up by a deed of agreement a 5-anna share to the plaintiff No. 3, who was the son of the first plaintiff.

With regard to the bond he held it proved that defendant No. 1 and his wife had borrowed Rs. 1,000 from Khotiza Sultan, the bond being executed on behalf of the wife by one Amzad, by virtue of an am-mokhtarnama, and that the property was mortgaged for the debt. The bond was duly registered. He accordingly decreed the suit with costs.

On appeal this decree was set aside by the District Judge, and the defendants were awarded their costs in both Courts.

The plaintiffs now preferred a special appeal to the High Court.

Mr. *Evans*, Moonshi *Mahomed Yusoof* and Baboo *Girish Chundra Chowdhry* for the appellants.

Moulvi *Serajul Islam* for the respondents.

The judgment of the Court (WILSON and FIELD, JJ.) was delivered by

WILSON, J.—It is not the ordinary course of procedure for this Court to interfere in second appeal with any findings of fact which have been arrived at by the lower Appellate Court; but we are well within the scope of the authorities in holding that where the lower Appellate Court has clearly misapprehended what the evidence before it was, and has thus been led to discard or not give sufficient weight to important evidence, and to give weight to other evidence to which it is not entitled, and has thus been led not into any mere incidental mistake, but totally to misconceive the case, this Court may interfere. Now in this case there were several material questions to be decided; the first was whether the bond sued upon was executed by Ausur. As to that the Judge of the lower Appellate Court said in his judgment at page 15 of the Paper Book: "It appears to me that the evidence as to Ausur's signature to the bond is most unsatisfactory, and that that signature is in no way proved; (s. 67) Evidence Act." If that finding stood by itself it might probably be that we should not interfere with it,

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but it clearly refers to an earlier paragraph in the judgment, and that earlier paragraph shows that the reason why the lower Appellate Court was dissatisfied with the evidence of the witnesses was that he did not think they were present at the time, for he observes that not one of them says that he saw Ausur execute the bond; in other words he understands them not as speaking of something which was done while they were present, but of a transaction, the description of which they had heard from others. It appears to us that this is a clear misapprehension on the part of the Judge, and that these witnesses clearly intended to speak as of a thing they had themselves seen. That seems to us clear from their direct examination, and in the case of several of them it is made still more clear from their cross-examination, from the tenor of which it seems to us that all parties present at the trial understood that they were speaking of a transaction effected in their presence. This misapprehension on the part of the Judge in the lower Appellate Court justifies us in remanding the case for him to reconsider his finding upon that point. The next point is as to the execution of the bond by Amzad on behalf of Shurifunnissa. As to that the case stands on precisely the same footing as it does as regards the execution of the bond by Amzad. Then there remains the question as to the existence of the mokhtarnama, under which it is said that Amzad executed the bond on behalf of Shurifunnissa, and there the Judge in the lower Appellate Court appears to us to have again fallen into somewhat similar errors. The most important witness as regards this is Gour Chunder Dass, and the learned Judge distrusts the evidence of this witness as to the mokhtarnama on the ground that it was not produced in the 1875 suit. That is an observation that would be entitled to great weight if it was suggested that it had been fabricated since 1875, but when it is clear on the evidence that it existed long before 1868, it appears that the Judge has been seriously misled. Then, again, speaking of the evidence of the same witness, he says that according to him the mokhtarnama was given by Shurifunnissa only and not by her and Ausur; and in this he finds a discrepancy between the evidence of this and the other witnesses. That is also clearly a mistake. The witness only says that a mokhtarnama on the part of Shurifunnissa was produced, and he is

speaking of a time at which the only question of the slightest importance would be whether it was executed by Shurifunnissa. Ausur the husband went there to execute for himself, and the question was how was the wife represented. Then according to him the mokhtarnama on his behalf is produced to prove her authority for the execution of the bond. There is, therefore, a clear misapprehension on the part of the Judge as to the meaning of this evidence. Then speaking of the same document he says that one of the witnesses, Mohurrum Mir, to whom a power was given to register the document, and who may have been presumed to have some acquaintance with its contents, has been examined, but has not been asked a word about it, while it appears on the evidence that Mohurrum was examined about it, and made certain statements concerning it. These seem to be the considerations which led the Judge of the lower Appellate Court to reject the truth of the story as to this mokhtarnama, and as they seem to us to be founded on mistakes of fact, the learned Judge should have an opportunity of reconsidering his views. In remitting the case to him and asking him to reconsider his findings, we think it right to point out that the matters mentioned by him at page 18 with regard to the registration in 1868, and the use of the mokhtarnama during the same year, and the other evidence in the case as to the existence of this document at and about that time that these matters appear to us entitled to very great weight.

The case will, therefore, go back to the Judge in the Court below for reconsideration. That being so, it becomes necessary to deal with two questions that have been raised before us—one the question of certificate, and the other the question of interest. If the ultimate finding in the lower Appellate Court should be still in favour of the defendants, these two questions do not arise; otherwise they do. It was held in the lower Appellate Court that this suit could not be maintained for want of a certificate to the estate of Rabia. But on the facts of the case it does not appear to be so, because, under the exception in the section in question, no certificate is required when there is no doubt as to the title of the party claiming the money. Section 2, Act XXVII of 1860 says: "Unless the Court shall be of opinion that payment of the debt is withheld from fraudulent or vexatious motives, and not

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from any reasonable doubt as to the party entitled." Now if the plaintiff's story be true, then the defendants who deny their liability must be acting fraudulently, as there can be no reasonable doubt that all the parties who may be entitled to these sums of money are plaintiffs in the suit. Then the question of interest arises in this way. The Judge says (page 13 of the Paper Book): "But for my finding on the certificate matter, and supposing the bond to be genuine, I should allow 18 per cent. per annum interest from the 10th April 1868 to the 10th October 1868, and (as damages) six per cent. per annum from the date on which the 1875 suit was instituted, to the date of decree in the present suit;" and so on: that is to say, he disallows the interest at the rate agreed in the bond for a certain very considerable period. That, it appears to us, is wholly irregular and contrary to law. If the bond be genuine, the plaintiffs are entitled to recover the agreed rate of interest without any deduction. It would be a grave injustice if it were not so, as the defendants would thereby be allowed to keep the money in their pockets without paying interest for it. The costs will follow the result.

As the case has been pending for a very long time, the record will be sent down at once.

Appeal allowed and case remanded.

Before Mr. Justice Mitter, Officiating Chief Justice, & Mr Justice Maclean.

ANANDA BIBEE (PLAINTIFF) *v.* NOWNIT LAL AND ANOTHER (DEFENDANTS).*

1882 *August* 9.

Hindu Law—Inheritance—Mitakshara—Daughter-in-law.

Under the Mitakshara and usages obtaining in the district of Behar a daughter-in-law, whose husband has predeceased his father, is not in the line of heirs of her father-in-law.

Per MITTER, J.—A daughter-in-law, not being a joint owner with her father-in-law, cannot after his death take his estate by right of survivorship.

THIS suit was instituted on the 10th May 1879. The plaintiff, the widow of Mangli, who predeceased his father Gocul Chand, whose father Muni Lal was the son of one of two sisters Dukho Bibi and Sukho Bibi. The defendants were the representatives of Lal Bahadur and Ram Bahadur, the two brothers of Dukho Bibi and Sukho Bibi.

The plaintiff alleged that by a deed of gift, dated the 17th Magh 1195, F. S., (8th Feb. 1788) Lal Bahadur and Ram Bahadur had granted the ancestral property in dispute to their sister Dukho Bibi, and had put her in possession of it; that on her death Muni Lal had come into possession, and on his death Gocul Chand had come into, and held possession till his death in 1280 (1873); and that since then the plaintiff had been, and still was, in possession. That by an order, dated the 14th December 1878, in a mutation proceeding under Beng. Act VII of 1876, an application by her for the registration of her name as proprietor had been rejected, and the names of the defendants had been ordered to be registered.

She claimed that on her right as proprietor being established, her possession might be confirmed.

The plaintiff did not produce the deed of gift, but alleged that it had been fraudulently taken from her possession by the first defendant.

The defendants denied the gift set up, and the alleged wrongful

* Appeal from Original Decree No. 212 of 1880 against the decree of Baboo Koylash Chunder Mookerjee, Officiating Second Subordinate Judge of Mozufferpore, dated the 18th May 1880.

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abstraction of the deed. They alleged that possession of the land had never been parted with by their ancestors or by themselves, and also that Gocul Chand had been their servant. They further questioned the plaintiff's title as heiress of her father-in-law Gocul Chand.

Three issues were framed by the lower Court—

1*st.*—As to the plaintiff's right as heiress of her father-in-law.

2*nd.*—As to the truth of the alleged gift to Dukho Bibi and the abstraction of the deed.

3*rd.*—As to the plaintiff's possession and that of her ancestors.

Except as to the alleged abstraction of the deed of gift by the first defendant, the lower Court found in favour of the plaintiff on the second and third issues, but found against her on the first. The suit was therefore dismissed.

The plaintiff appealed to the High Court on the issue found against her, and the defendants filed a cross appeal.

Baboo *Guru Dass Bannerjee* and Baboo *Golap Chunder Sircar* for the appellant.

Baboo *Hem Chunder Bannerjee* and Munshi *Mahomed Yusoof* for the respondents.

The following judgments were delivered :—

MITTER, J., after referring to the facts and evidence, continued as follows :—

The possession of the disputed mouzah by Gocul Chand and his father is not therefore shewn by any evidence to have been permissive. Whether this possession was referable to the title derived under the alleged deed of gift to Dukho Bibi is not made clear upon the evidence. If the plaintiff's allegation of the abstraction of the deed of gift from her by the defendant No. 1 be not correct, then there is no evidence to connect the possession of Gocul Chand and his father with the title under the alleged deed of gift. The lower Court has rejected this part of the plaintiff's story. I see no reason to dissent from that opinion.

But although the title under the deed of gift is not proved, the possession of Gocul Chand and his father for more than

twelve years being established, and it being not shewn that that possession was with the permission of the defendants and their ancestors, it seems to me that we must hold that Gocul Chand had a good title to this property.

This brings us to the question of the Hindu law raised in the case, *viz.*, whether, after the death of Gocul Chand, the plaintiff can claim any right to the disputed property entitling her to the possession of it as against the defendants.

As to the question of possession after Gocul Chand's death it seems to me to be clear upon the evidence that it remained with the plaintiff till the Land Registration order was passed. The Sub-Judge says that the possession of the plaintiff "is not yet extinct;" but it is difficult to understand how it can be said, after the adverse order was passed under the Registration Act under s. 59, that the plaintiff's possession continued. The present suit may, under the Rulings of this Court, be considered as one for recovery of possession. Upon the face of the plaint it is clear that the plaintiff, at the time of the institution of the suit, could not have been in possession, and if she can make out her title she, in my opinion, would be entitled to a decree for possession.

As regards the title of the plaintiff derived from Gocul Chand it has been contended before us (1) that a daughter-in-law, under Mitakshara law, is entitled to inherit; (2), that, supposing that she is not in the line of heirs, the plaintiff is entitled to the property in dispute by right of survivorship, as she, during Gocul Chand's lifetime, was a member of a joint Hindu family with him; and (3), that, supposing that these contentions are not valid, the plaintiff having undoubtedly a maintenance charge upon the disputed property, is entitled to the possession of it, and to have her title declared as against the defendants, who have no sort of right to it.

We shall deal with these three questions in the order in which they have been raised before us.

On a careful examination of the digests of Hindu law which are considered of authority in the district from which this case comes, I am clearly of opinion that the daughter-in-law is not in the line of heirs at all.

The authorities most respected in Behar are the Mitakshara

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and the Viramitrodaya. It was contended before us that, according to the Mitakshara, a daughter-in-law is entitled to succeed as a gotraja sapinda. It has been settled now by more than one decision that the word sapinda is used by the author of the Mitakshara in the chapters on inheritance, in the same sense in which it is defined by him in the Achara Kanda, *i.e.*, in chapters on Rituals. See *Lallubhai Bapubhai* v. *Mankuvarbai* (1); also *Bharmangavda* v. *Rudrapgavda* (2); and *Umaid Bahadur* v. *Udoi Chand* (3). It has been contended that, according to this definition of sapinda, a daughter-in-law comes within that class, and that as the author of the Mitakshara in part II, chapter II, s. 5, page 1 lays down, "if there be not even brothers' sons, gotrajas share the estate. Gotrajas are the paternal grandmother and sapindas and samanadakas"—all female sapindas succeed gotrajas. But this contention cannot be maintained in the face of paras. 3, 4 and 5 of the same section. Para. 3 says that on failure of the paternal grand-mother, the heirs are samana-gotraja sapindas; then in para. 4 the author thus explains the rule laid down above: "Here, on failure of the father's descendants, the heirs are successively the paternal grand-mother, the paternal grandfather, the uncles and their sons;" then para. 5 says: "On failure of the paternal grand-father's line, the paternal great grand-mother, the paternal great grand-father, his sons and their issue inherit. In this manner to seventh degree must be understood, the succession of kindred belonging to the same family generally."

In these passages the author of the Mitakshara lays down a compact series of heirs from the father down to the issues of the great grand-father entitled to succeed as sapindas. There is no room for introducing the wives of the sapindas as heirs in this compact series. For instance, on the failure of the father's descendants, the paternal grand-mother succeeds. This being an inflexible rule, the wives of the father's descendants cannot have any place in the compact series of heirs from the father down to the grand-mother. If the contention under consideration were correct, then, in a competition between the paternal grand-mother and a brother's widow, the latter would be entitled to inherit, but in the

(1) I. L. R., 2 Bom., 388. (2) I. L. R., 4 Bom., 181 (3) I. L. R., 6 Calc., 119

face of the positive rule laid down in paragraph 4, a brother's widow cannot have any claim to inheritance in preference to the paternal grand-mother. The same observations will apply to the wives of the descendants of the paternal grand-father.

But it has been contended that paragraphs 3, 4 and 5 cited above do not exhaust all the sapinda heirs; they only lay down that collaterals, who are the descendants of the father, grand-father, and great grand-father, two degrees removed, are entitled to the inheritance in the order laid down in them; and that the other sapindas would come in under the class gotrajas. The words "descendants and sons" used in these paragraphs have been held in the decision of Mr. Harrington, quoted in *Rutcheputty Dutt Jha* v. *Rajunder Narain Ras* (1), as used in their generic sense, meaning descendants generally. Mr. Harrington says: "The term *putra* or son, in the Mitakshara and its commentary the *Sabodhene*, is frequently used as a generic term for male issue or descendant, and must be so construed in several parts of the Mitakshara, or the grandson, as well as the great grandson would be excluded from the immediate succession, though acknowledged in every system of Hindu law to represent their deceased father and grand-father, and entitled with sons to share the estate of a person leaving sons, grandsons, and great grandsons, the father of the grandson, and father and grand-father of the grandson being previously dead. This principle appears to be recognized in the Mitakshara and both its commentaries, in the third paragraph of the introductory section and notes referring thereto. (See page 238 of Mr. Colebrooke's Translation). In that paragraph, after stating that the 'wealth of the father, or of the paternal grand-father, becomes the property of his sons or of his grandsons in right of their being his sons or grandsons, and this is an inheritance not liable to obstruction,' it is immediately added, 'but property devolves on parents or uncles' brothers and the rest, upon the demise of the owner, if there be no male issue, and thus the actual existence of a son and the survival of owner are impediments to the succession, and on their ceasing, the property devolves on the successor, in right of his being uncle or brother;

(1) 2 Moore's I. A, 132.

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this is an inheritance subject to obstruction. The same holds good in respect to their sons and other descendants.' Here it is manifest the words translated 'male issue' and a 'son' were not meant to exclude grandsons before mentioned, and the two commentators agree in construing the last clause to intend 'the sons or other descendants of the son and grandson.' The same construction must, I think, be put on the words 'sons' and 'issue' (*putra* and *sunava*), in the 4th and 5th paragraphs of the fifth section, and second chapter of the Mitakshara, and this interpretation is indeed indicated by expressions in the same paragraphs, *viz.*,' on failure of the father's descendants' (santana), and 'on that of the paternal grand-father's line' (santana). To adopt the construction proposed by the appellant would be to cut off all the descendants below the grandson of the father, grand-father and every other ancestor, and would render nugatory the provisions in the Mitakshara, as well as in the other books of law which expressly state 'the succession of kindred belonging to the same family, and connected by funeral oblations to the seventh degree, or if there be none such, the succession devolves on kindred connected by libations of water, and they must be understood to reach to seven degrees beyond the kindred connected by funeral oblations of food, or else as far as the limits of knowledge as to birth and name extend.' (See Translation of Mitakshara, part II, chap. II, sec. V, paras. 5 and 6)."

If this be the correct meaning of the words, "sons and descendants" as used in paragraphs 3, 4 and 5, it is quite clear that they contain an exhaustive enumeration of all the sapindas, and the females, excepting those that are enumerated by name, would be necessarily excluded. But, according to the spiritual benefit theory, which, in the opinion of the author of the Viramitrodaya, determines the position of gotrajas and other heirs the words "sons or descendants" would include only grandsons and great-grandsons. According to Apararka, a digest writer of later date than the Mitakshara, the word "sons or descendants" include only sons, grandsons and great-grandsons. See Tagore Law Lectures, 1880, p. 648. If this latter view be correct, then no doubt paragraphs 3, 4 and 5 cited above would not be an exhaustive enumeration of the sapindas. But the last words

of paragraph 5, *viz.*, "in this manner must be understood the succession of samanagotra sapindas," indicate the mode in which the list of enumeration is to be completed. If we are to complete the list by following that mode, then the wives of sapindas would have no place in that list.

Then again the author of the Mitakshara is a very strong advocate of woman's rights; he has gone to the length of laying down that where women inherit their right is absolute. If in his opinion the wives of sapindas were entitled to succeed, he would have certainly expressly indicated his opinion in the section treating of the succession of gotrajas.

There is one more consideration arising from the passages cited above, which, in my opinion, almost conclusively shews that it was not the intention of the author of the Mitakshara to confer any heritable rights upon female sapindas not specifically mentioned. It is thus an unmarried daughter of any ancestor within six degrees would be entitled to inherit as a sapinda according to the contention under our consideration. Thus, for instance, an uncle's unmarried daughter would be entitled to inherit in preference to a brother's great-grandson, and supposing she dies after marriage leaving a son, that son, who is merely a bandhu of the last male owner, would obtain the property, although there is a samanagotra sapinda in existence. This could never have been the intention of the author of the Mitakshara; because, according to the scheme of succession laid down by him, a bandhu has no heritable rights in the presence of a gotraja, however remote his connection may be with the deceased.

Then, again, a married daughter of a sapinda would not be in the line of heirs at all, because she would not be a samanagotra sapinda, neither would she come within the category of bandhus, because it is admitted that the class of heirs indicated by the term bandhu includes males only. It seems to me that it could not have been the intention of the author of the Mitakshara to make such a distinction between a married and an unmarried female sapinda relative. In the one case she would occupy a very high position in the line of heirs; in the other, she would be nowhere.

For these reasons it appears to me that, on the Mitakshara

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itself, there is no foundation for the contention that the wives of the sapindas are entitled to inherit as sapindas.

Whatever doubts there may be as to the validity of the contention under our consideration with reference to the Mitakshara, the Viramitrodaya is clearly against it. The author of the Viramitrodaya in chapter III, part 7, treats of the succession of gotrajas. He quotes paragraph 1, chapter II, section V of the Mitakshara as defining who the gotrajas are. Then he refers to the opinion of the authors of the Smriti Chandrika and Dayabhaga to the effect that the term gotraja is a compound denoting males only; then he controverts this opinion. Having controverted it he says: "According to the previously cited interpretation put upon the text of Sruti (therefore women are devoid of the senses, &c) by the venerable Vidyaranga in that text Sruti does not refer to a prohibition of inheritance, and therefore no difficulty arises, nor is any explanation necessary. But it should be remarked that how can that interpretation be accepted when it is in conflict with the text of Baudhayana. Granting that the word Indriya does mean the Soma juice in conformity with the context, yet, inasmuch as there is an absence of another text declaring the incapacity of females to inherit, and as it is not possible for the present Smriti to be unsupported, and as therefore the inference of the existence of a prohibition is necessary to justify the assertion of a fact, *viz.* (that females are deemed incompetent to inherit), we should explain the present text just as in the instance, 'therefore an unknown embryo being killed (a man becomes) murderer of a Brahmana.'"

A few words of explanation are here necessary to explain the above passage. The text of Baudhayana, referred to above, is to the following effect: "A woman is not entitled to inherit, for thus says the Veda. Females and persons deficient in the organs of sense are deemed incompetent to inherit." This Vedic text Vidyaranya, a commentator on the Taittiriya Veda, interpreted in a different way, so that it would have no reference to inheritance.

Referring to this interpretation, the author of the Viramitrodaya says that this interpretation cannot be accepted, because it is in conflict with the text of Baudhayana. Then he argues that

supposing the interpretation of the Vedic text of Vidyaranya is correct, it must be presumed that there is another text in the Sruti justifying the exclusion of the females, for a text of Smriti must have a text of Sruti to support it. The existence of a text of Sruti in this instance must be presumed in the same way as in the instance of the text of Smriti to the effect, "therefore an unknown embryo being killed, &c., &c."

According to the opinion of Viramitrodaya, therefore, women are not generally entitled to succeed unless they are specially mentioned. A daughter-in-law is not one of these enumerated female heirs as given in the Viramitrodaya. The author of the Viramitrodaya expresses the same opinion in another passage, see page 174 of Baboo Golap Chunder Sirkar's translation. It is to the following effect: "As for the text of Sruti, *viz.*, 'therefore women are devoid of senses and incompetent to inherit,' and for the text of Manu based upon it, *viz.*, 'indeed the rule is that women are always devoid of senses and incompetent to inherit,' these are both to be interpreted to refer to those women whose right of inheritance has not been expressly declared." Then again in another passage in page 244, the author of the Viramitrodaya expressly lays it down that a daughter-in-law is only entitled to maintenance and not to inheritance. He says, "but the daughter-in-law and others (of the same sex) are entitled to food and raiment only, for the nearness as a sapinda is of no force when it is opposed by express texts. Since a text of the Sruti declares: 'Therefore women are devoid of senses and incompetent to inherit,' and a text of Manu founded upon it says, 'indeed the rule is that devoid of the senses, and incompetent to inherit, women are useless.' The conclusion arrived at by the author of the Smriti Chandrika, Haradatta and other southern commentators as well as by all the Oriental commentators, such as Jimatavahana, is that those women only are entitled to inherit, whose right of succession has been expressly mentioned in texts such as 'The wife and the daughters also, &c.,' but that others are certainly prohibited from taking heritage by the texts of Sruti and of Manu."

The learned pleaders for the plaintiff, appellant, further relied upon passages from Nirnaya Sindhu, Ballambhatta, Subodhini and

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Baijainti. In none of these works on Hindu law is there any authority for the broad contention that *all* female sapindas are entitled to inherit. All that can be said on their authority is, that some of them have enlarged the list of female heirs entitled to succeed. Of these the daughter-in-law is mentioned as one of the heirs in Baijainti, in Ballambhatta and Nirnaya Sindhu. This last mentioned work treats of Rituals, and is therefore hardly entitled to any authority on a question of inheritance. Kamalakura, the author of Nirnaya Sindhu, is also the author of Vivada Tandava, a treatise on the law of inheritance. In this latter work he in most emphatic words deprecates the heritable rights of women other than those expressly enumerated as heirs. See Tagore Law Lectures of 1880, page 664. Baijainti's and Ballambhatta's opinion being not in accordance with the usage obtaining in Behar and the North-Western Provinces, as will be shewn hereafter, cannot be followed in preference to the Virouiboddy.

Before examining the decided cases upon this point it may be noticed here that of the European text writers, Sir Thomas Strange, in Vol. I, page 146, lays down broadly that, "according to the general principles of Hindu law, the sex is not entitled to inherit except in a few specified instances." West and Buhler discuss this question, and are inclined to the opinion that, in countries governed by the Mitakshara law, wives of sapindas are entitled to inherit as sapindas.

As Smriti Chandrika and Dayabhaga are quite clear upon the point (*i.e.*, their opinion is against the contention of the appellant,) we shall not refer to any cases decided in accordance with these two digests. We shall not also refer to any Bombay cases, because the law upon the subject has now been settled in that Presidency by the decision of the Judicial Committee in the case of *Lallubhai Bapubhai* v. *Cassibai* (1). This last mentioned decision is entirely based upon the usage obtaining in the Presidency of Bombay. Their Lordships distinctly say that the Mitakshara is silent upon the point. They are also of opinion that the contention is not sound according to the Viramitrodaya.

Of the cases decided by this Court and the late Sudder Dewany Adawlut of Calcutta, we find instances in which the right of inheri-

(1) I. L. R., 5 Bom., 110.

tance of the wife of a deceased sapinda was not set up, although if it had been set up it would have materially affected the decision of the Court. For instance, in *Baboo Shewsuhai Singh* v. *Balwunt Singh* (1), the competition to inheritance lay between a daughter's son and a daughter-in-law. The daughter-in-law's right was put upon the question of fact, whether or not her husband survived his father. Similarly in *Maharajah Ram Kissen Singh* v. *Rajah Sheonundun Singh* (2), the daughter-in-law's right was not set up. It is quite clear, if it could have been set up successfully in that case, the plaintiff would have been defeated, because he was a mere bandhu. In determining a question of usage, it seems to me that instances, where the particular usage in dispute was not set up, although it was of the utmost importance to set it up, are of great value. Such instances afford a very satisfactory basis for the conclusion that the usage in dispute is not really in existence. The Full Bench decision in *Lala Jot Lal* v. *Durani Kooer* (3), and the Full Bench case cited at page 669 of Tagore Law Lectures of 1880 by Baboo Raj Koomar Surbhadhikari, are also instances of this kind. The questions for decision in these cases were, whether the step-mother and the step-grand-mother were heirs according to the Mitakshara law. It was decided that they do not come within the purview of the texts relating to the succession of the mother and the grand-mother. It was not contended that, although they did not come within these texts, still they were entitled to inherit as sapindas.

In *Mussamut Soodeso* v. *Bishesshur Singh* (4) it was decided that a sister-in-law (deceased brother's widow) is not in the line of heirs according to the Mitakshara law. See also *Thakooranee Deo Koonwur* v. *Thakooranee Gumbheer Koonwur* (5). In *Mussamut Murachee Koour* v. *Mussamut Ootma Koonr* (6), it was decided that a daughter is entitled to succeed in preference to a son's widow, who is only entitled to maintenance. In *Dilraj Koonwur* v. *Sooltan Koonwur* (7), it was held that a son's widow is not an heir according

(1) S. D. A. (1858) 400.
(2) 23 W. R., 412.
(3) B. L. R. Sup. Vol., 67.
(4) S. D. A., N. W. P., 1864, Vol. II, 375.
(5) S. D. A., N. W. P., 1864, Vol. II, 284.
(6) S. D. A., N. W. P., 1864, Vol. I, 171.
(7) S. D. A., N. W. P., 1862, Vol. I, 240.

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to the Mitakshara law. The last case upon the point is the decision of the Allahabad Court in *Gauri Sahai* v. *Rukko* (1). This case clearly lays down that, of the females, none but those that are specified by name are entitled to succeed. Against this consensus of opinion as expressed in these cases there is a solitary decision of the Court of the N. W. P., which may be considered to lend some support to the contention of the appellant. It is the case of *Mussamut Bhuganee Daiee* v. *Gopaljee* (2). The plaintiff in that case was the widow of the first cousin of the deceased proprietor, and the defendant was his great grand-father's great grandson. The plaintiff was joint in food with the deceased, while the defendant was separate from him. The case was decided in favor of the plaintiff on the ground of the right of survivorship. The Pundit, upon whose opinion it was decided, did not put the right of the plaintiff upon the ground of sapinda relationship. This case has no relevancy to the question now under consideration, because it did not uphold the plaintiff's right on the ground of sapinda relationship. On the other hand, the circumstance that the Pundit consulted did not base his opinion upon the ground of sapinda relationship, affords some grounds for the conclusion that the usage in question does not exist in these districts.

Therefore, applying the same test which was applied by their Lordships of the Judicial Committee in the case of *Lallubhai Bapubhai* v. *Cassibai*, (3) *viz.*, the test of usage, it seems to me that the contention of the appellant is not sustainable. For all these reasons I am of opinion that, according to the Mitakshara law and usage obtaining in the district from which this case comes, a daughter-in-law is not in the line of heirs at all.

The next contention is that the plaintiff in this case is entitled to succeed by right of survivorship. It has been said that she, while her father-in-law, Gocul Chand, was alive, was living with him as a member of a joint Hindu family, and therefore on his death she is entitled to the property left by him. It seems to me that this contention is wholly untenable. The foundation of the right of survivorship is joint ownership. In this case it cannot for

(1) I. L. R., 3 All, 45.
(2) S. D. A., N. W. P., 1862, Vol I, 306.
(3) I L R, 5 Bom, 110.

a moment be contended that the plaintiff had any sort of ownership in the property in dispute during the lifetime of her father-in-law, Gocul Chand. This contention, therefore, in my opinion, fails.

Lastly, it has been urged that, as the plaintiff is entitled to her maintenance out of the property in dispute, and that as the defendants have no sort of right to it, she is entitled to have her right and possession confirmed as against them. But this argument proceeds upon the assumption that the defendants have no sort of right to the property in dispute. It seems to me that upon the facts admitted in this case, the defendants, as father's bandhus of Gocul Chand, are entitled to inherit the property left by him. According to the plaintiff, Muni Lal, the father of Gocul Chand, was the sister's son of Dukhoo, to whom the property in dispute was given by her brothers Lal Bahadur and Ram Bahadur. According to the defendants, Muni Lal was Dukho's own son. Whether the one or the other statement be correct, it is clear that Muni Lal was the sister's son of Lal Bahadur and Ram Bahadur. The defendants are the grandsons of either Ram Bahadur or of Lal Bahadur, therefore Muni Lal and the defendants are sapindas to each other. The defendants consequently being the father's bandhus of Gocul Chand in the absence of nearer heirs are entitled to the property left by Gocul Chand as his heirs. See *Umaid Bahadur* v. *Udoi Chand* (1). The plaintiff is certainly under the Mitakshara law entitled to maintenance out of the property left by Gocul Chand, but she has no title to the property as the heiress-at-law of her father-in-law.

The appeal must, therefore, be dismissed with costs.

MACLEAN, J., after referring to the facts and evidence, came to the conclusion that if the possession continued with the plaintiff's father-in-law and his father, the proprietary title was still in the defendants and their ancestors, and continued as follows :—

I would therefore reject the plaintiff's claim for a declaration of her title as proprietor. Neither do I think that she is entitled to a decree confirming her possession, inasmuch as (apart from the question as to the position of a daughter-in-law whose husband has predeceased his father) she has failed to prove her title.

(1) I. L. R., 6 Calc., 119.

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Upon the question so elaborately discussed, and depending on considerations of Hindu law, I shall say but little. In the view of the plaintiff's case which I have taken, the decision of the question is not necessary.

The claim of the plaintiff as daughter-in-law is founded upon the 5th section of the second chapter of part II of the Mitakshara: "If there be not even brother's sons, gentiles (gotraja) share the estate" and again V. 3; "on failure of the paternal grandmother the kinsmen sprung from the same family with deceased and connected by funeral oblations (samana gotraja sapinda) namely, the grandfather and the rest inherit the estate."

It is perhaps unnecessary to say that the wife must be recognised as samana gotraja sapinda. Sapinda because she and her husband are the generators of one body; sagotraja or samana gotraja because on her marriage she enters the gotra of her husband. The next step for consideration is, whether she inherits under the rule "to the nearest kinsman (sapinda) (male or female) the inheritances next belongs," Manu IX, 187.

We have express authority for the heritable right of the widow, daughter, mother, grand-mother, &c., (Mitakshara, Chapter II.) The commentaries of Kiseswara and Balambhatta make no distinction between males and females, both being included in gotraja. The latter, Balambhatta, assigns a specific place to the widow of a predeceased son, next after the paternal grand-mother. Nandu Pandita also (Vaijyanti) prefers the son's widow to the daughter; but at present we are not called upon to assign a place to the daughter-in-law, having merely to decide whether she is entitled to take property which her husband would have taken in preference to the male representatives of a remote branch (cognates). The author of the Viramitrodaya, referring to a text of Baudhayana, deduces from it that females as a class are not entitled to heritage. He accepts, however, the right of those expressly mentioned, but he expressly mentions the daughter-in-law as entitled to food and raiment only. At the same time he points out that the paternal grand-mother is not expressly mentioned any more than the wives of other gotraja sapindas by Jogeswara.

Upon such consideration, therefore, as I am able to give to the subject, it appears to me that we have three positions established:—

(1.) That while the grand-mother and great grand-mother, &c., only are expressly mentioned, the wives of other sapindas would also succeed.

(2.) That the Mitakshara does not exhaustively enumerate the sapindas.

(3.) That the son's widow is a gotraja sapinda.

But while effect is given to these propositions in the Bombay Presidency, it seems to be conclusively understood that up to the present day females, not expressly mentioned, have never been recognised (perhaps it may be said have seldom claimed to be recognized) as entitled to succeed in Benares and the western portion of the Lower Provinces. A case was recently before us in reference to other matters in which an examination of the facts will shew that the right of a daughter-in-law to succeed was raised but was rejected. The pundit's Vyavastha was opposed to the claim of the daughter-in-law as against that of the daughter's son, on consideration of Mitakshara law (A. O. D. 187-80). In *Gauri Sahai* v. *Rukko* (1) it is expressly noted that none but females expressly named can inherit, and the widow of a paternal uncle (a gotraja sapinda) is declared not to be an heir.

In *Ranee Pudmavati* v. *Baboo Doolar Sing*, (2) the widow of a deceased brother was defeated by gotraja sapindas of her husband and his brother (great grand-father's grandsons.) Perhaps this case is not clear authority, except as shewing that the widow of a brother *who predeceased* was not recognized in preference to other sapindas.

No case has been cited as directly supporting the plaintiff's claim, and under these circumstances, though decidedly inclined to view it with favour, I think that her success "would have such an effect in disturbing existing titles that it is safer not to run counter to that which appears to be the current of authority." The more so as my learned colleague comes to a conclusion which is opposed to the inclination I have in the plaintiff's favor. I concur in the order that the appeal should stand dismissed with costs

Appeal dismissed.

(1) I. L. R., 3 All., 45. (2) 4 Moore's I. A., 259.

Before Mr. Justice Mitter, Offg. Chief Justice, Mr Justice White and Mr. Justice Macpherson.

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July 31.

PRASIDHA NARAYAN KOER (PLAINTIFF) *v.* MAN KOCH (DEFENDANT*)

Occupancy, Right of, in Assam—Act X of 1859—*Ejectment, Suit for.*

Per MITTER and WHITE, JJ (MACPHERSON, J, dissenting)—Act X of 1859 does not apply to lands situated in the Assam valley district.

In a suit brought to eject a tenant of certain land situated in Assam on the ground that he was a trespasser, where it was shewn that he had held the land direct from the Government for a considerable time, and that the land had been made over during his tenancy to the plaintiff in exchange for certain other lands made over to the Government, and where the tenant claimed to have acquired a right of occupancy under Act X of 1859, and not to be liable to ejectment in the manner sought for,

Held, per MITTER and WHITE, JJ., that as that Act did not apply to lands situated in Assam, no such right could be claimed, and the suit being properly framed, the plaintiff was entitled to the relief he asked for.

IN this suit the plaintiff sought to eject the defendant from certain land situated in mouzahs Durgagon and Barowtola, in the sub-division of Mungaldai, Darrang, in the province of Assam. The land in question was formerly Government kheraj land, but at the time of the survey operations in 1283 (1876,) it was transferred to the plaintiff by the Government in exchange for an equal quantity of land belonging to his estate. The appeal originally came on for hearing before a Division Bench composed of WHITE and MACPHERSON, JJ., and the judgment of that Bench, which sufficiently states the facts, was as follows :—

WHITE, J.—This is an appeal by the plaintiff against the decree of the Judge of Assam, affirming a decree of the Extra Assistant Commissioner of Mungaldai dismissing the plaintiff's suit.

The suit is to eject the defendant from 5*b*, 4*c*, 17½*d*, of rupit land, occupied by him in mouzah Mungaldai. The defendant

* Appeal from Appellate Decree No. 825 of 1880 against the decree of W. E. Ward, Esq, Judge of the Assam Valley Districts, dated the 4th February 1880, affirming the decree of Baboo Guru Persad Das, Extra Assistant Commissioner, vested with the powers of a Munsiff of Mungaldai, dated the 25th June 1879.

originally held the land under Government, executing annual pottahs for the same at varying rents, and sometimes holding less, and sometimes a larger quantity of land than the land in suit. In 1283 (1876) an exchange of lands took place between the Government and the plaintiff, on which occasion the land in suit was by Government made over to the plaintiff. The defendant's last annual Government pottah expired in 1875. The suit was brought in 1879, and the defendant has paid no rent in the interval.

The plaintiff alleges in his plaint that, after the exchange was effected, he repeatedly asked the defendant to make some settlement with him or quit the land, and that in 1284 (1877) the defendant refused to come to a settlement.

The defendant, on the other hand, alleges in his written statement that he had from a long time before the British Government came to the country been in possession of the land in dispute from generation to generation; that he had got a pottah from Government and a right of occupancy in the land; and that he has a right to hold the land in dispute under the plaintiff in the same way that he held it under Government.

The pleadings of both the parties leave it vague as to the rate of rent or description of rent, about which the parties are disputing; but it appears from the judgment that the defendant is willing to accept the plaintiff as his landlord, provided he exacts no higher rent than he (the defendant) paid to Government, before the exchange was made. The plaintiff insists that the defendant must come to a new settlement with him, which means submit to an increased rent or to some new description of rent, or on the other hand must quit possession. The plaintiff has applied to him to take one or the other course, but he will do neither.

The first Court has dismissed the suit because, in its opinion, having regard to the annual pottahs which the defendant used to receive from Government, and to the Assam settlement rules, the defendant stands as regards the liability to ejectment, at least in as high a position as, and in some respects in a better position than, a Bengal ryot having a right of occupancy.

The lower Appellate Court draws a distinction between a ryot who has held under an annual pottah from Government, and one

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who has held under a ten years pottah, and puts a totally different construction upon the annual pottah and the Government rules, and arrives at a totally different conclusion as to the rights enjoyed by the defendant, but agrees in dismissing the suit on a not very intelligible ground, having regard to the above conclusions. He says "the Government may," in the case of a tenant holding under an annual pottah, as the defendant did, "rackrent up to any limit it pleases, and in this way if it was so minded would compel the cultivator to relinquish his land. As is well known Government doubled the rates all round ten years ago, and it may double them again to-morrow."

We had an abstract prepared of the annual pottahs which had been granted by Government to the defendant and his predecessors prior to the exchange, and it fully bears out this statement of the Judge.

The Judge proceeds to say that "though the annual tenant in Assam has no legal property in the lands held by him, there is no doubt that for a long series of years he has been practically given to understand that it will recognize his right to have his pottah renewed every year, so long as he consents to pay the Government revenue demanded of him." This demand, as is evident from the previous passage, may be an increased demand, or even an exorbitant one according to the Judge. What would be the remedy if the defendant refused to pay the increased demand? Or if he refused to come to a new settlement at the increased rent? I can see no other than an action of ejectment. His annual pottah having expired, he is holding on without a pottah; and although he is entitled to have another annual pottah offered to him at the expiration of the former pottah, yet if the rent in the new pottah may be an increased one, his right of re-settlement amounts to nothing more than a right to have the renewed pottah offered to him in the first instance, and if he won't accept the renewed pottah because the rent is increased, he must make way for some person who will agree to pay the increased rent, and if he will not quit, the Government must sue to eject him.

The District Judge, however, agrees with the First Munsiff in dismissing the suit on the ground that the plaintiff is not entitled to

treat defendant as a trespasser, and this conclusion he came to in consequence of some hazy agreement which is to be collected from the evidence of the Extra Assistant Commissioner, and which the Judge himself states was unfortunately not put into writing. This agreement is in the early part of the judgment stated in these words: "The plaintiff was given clearly to understand that the exchange would not be permitted unless he respected the rights of the Government tenants in the lands made over to him." Now this is merely a statement of the position in which the plaintiff would after the exchange stand to the tenants of Government according to law. The exchange would not affect their rights in any way. They would acquire no fresh rights by the exchange, but what rights they had before the exchange they would retain.

Towards the end of the judgment this supposed agreement assumes a rather different shape. It is stated thus: "The plaintiff agreed to respect that *guarantee* by receiving the same rent from defendant as the defendant would have been called upon to pay Government had no exchange been effected." This guarantee in a few lines above is described as "an implied guarantee from Government that their lands shall be re-settled with them every year subject to the condition of paying the Government revenue demanded. This sets the whole thing at large again, for Government may, as the Judge has found, increase the rent, and accordingly their demand, as it likes.

I can make nothing of this hazy agreement. It appears to me not to affect the question at all. The effect of the exchange was to put the plaintiff in the place of Government having the same rights as Government possessed, neither more nor less.

I see no reason to differ from the construction put by the Judge upon the form of the annual pottah and upon the settlement, and as the defendant will not take out an annual pottah at an annual rent, or at such a rent as the plaintiff may fix, and will not adopt the alternative of quitting possession as he has been requested to do, I think the present suit will lie, and I would reverse the decree of both Courts, and decree that the plaintiff recover from the defendant possession of the land in dispute.

It is argued by the Government pleader, who appeared for the defendant, that the latter had a right of occupancy under Act

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X of 1859. If this be so, I agree with the Government pleader that the plaintiff could not succeed in this suit, but would be confined to bringing a suit for enhancement. Neither of the judgments of the Court below proceeded upon this point; but the Government pleader contended that he is entitled to support the judgment appealed from, on any ground on which it can be supported. This appears to be so, and we have heard some argument on the question whether Act X of 1859 is in force in Assam. That Act, although in the title (which however is no part of the Act) mention is made of a limited part of India, has no clause in the body of the Act confining its operation. *Primâ facie*, therefore, it applies over the whole of India—I mean that part of it for which the Legislature is empowered to legislate; but this extended operation may be confined, if it can be gathered from the context that its operation is intended to be limited, or if the circumstances of the locality and the incidents of the tenures prevailing there are so peculiar that a comparison of them with the clauses of the Act shows that it could not be intended to extend to such locality. As regards the circumstances and incidents of the occupiers of the land in Assam, we have not sufficient materials before us to enable us to form an opinion.

But upon a consideration of the various clauses of the Act, I incline to think that at the time when the Act was framed, its operation was confined to the Regulation Provinces of the Bengal Presidency of which Assam was not one. Another question then arises as to whether it has, since its date, been legally extended to Assam. I have been referred to a notification on the subject, but am not satisfied that the Act has been so extended, or if as a matter of fact it has been so, that it was legally extended.

We have been referred to a recent case decided by a Division Bench, in which it appears to have been the opinion of the two learned Judges composing that Bench that the Act was in force in Assam, but that decision was an *ex parte* one and the point was not argued (1). It also appears from an earlier case that

(1) *Konaram Gaonburah* v. *Dhaloram Thakoor*, I. L. R., 6 Calc., 196.

Dwarkanath Mitter, J., was of opinion that the Act had been extended to Assam (1), but a long search has failed to unearth a notification (if any one exists) which supports that learned Judge's statements. The question, no doubt, is of considerable difficulty, and I should prefer not to decide it, but if I must decide it, then my decision is that the Act is not in force. My brother Macpherson is inclined to think that the Act is in force.

Under these circumstances this question will have to be re-argued before a third Judge or before another Bench. Subject to the result of that re-argument, and also of the determination of the further question whether, supposing Act X of 1859 is in force, the defendant has acquired a right of occupancy under that Act, my brother Macpherson agrees with me that the judgment of the lower Appellate Court should be reversed, and the plaintiff's suit decreed. Costs of this hearing reserved.

The appeal was accordingly subsequently re-argued before MITTER, J. (*Offg. C.J.*)

Mr. Piffard and Baboo *Bykuntnath Dass* for the appellant.

The Senior Government pleader (Baboo *Annoda Persad Banerjee*) for the respondent.

The judgment of the Court was as follows:—

MITTER, J.—I am of opinion that in the Assam Valley Districts, Act X of 1859 is not in force. That Act was passed by the Legislative Council of India which was constituted by the 16 and 17 Vic., Cap. 95. There is no clause in the body of the Act to show that its operation was limited only to a particular portion of British India. *Primâ facie*, therefore, it applies to the whole of British India, unless it can be shown from the context that its operation was intended by the Legislature to be limited to any particular portion of British India. But from the provisions of the Act itself it is quite clear that it does not apply to the whole of British India. For instance, the systems of land tenures and the settlements of Government revenue prevailing in the Presidencies of Bombay and Madras would make the provisions of this Act

(1) *Jullow Surma Patwaree* v. *Madhub Ram Atoi Boorha Bhukut*, 16 W. R., 202

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wholly inapplicable to those Presidencies. We have, therefore, to determine to what portion of British India the Act in question was intended by the Legislature to apply.

The preamble of the Act says :—

"Whereas it is expedient to re-enact with certain modifications the provisions of the existing law relative to the rights of ryots, with respect to the delivery of pottahs and the occupancy of land to the prevention of illegal exaction and extortion in connection with demands of rent and to other questions connected with the same; to extend the jurisdiction of Collectors and prescribe rules for the trial of such questions, as well as of suits for the recovery of the arrears of rent and of suits arising out of the distraint of the property for such arrears; and to amend the law relating to distraint, it is enacted as follows." Therefore, it is clear that the object of the Act was three-fold—first, to *re-enact*, with certain modifications, the existing laws regulating the rights of landlord and tenant regarding certain specified subjects; secondly, to extend the jurisdiction of Collectors; and, thirdly, to prescribe a law of procedure for the trial of the questions relating to those rights as well as for the trial of rent suits. Therefore, the provisions made in the Act for the carrying out of the first object can only apply to those districts in which the laws, which were re-enacted with certain modifications, were in force. Now these laws are the Regulations on the subjects in question which were repealed by the Act under our consideration. These regulations are specified in the repealing section of the Act, *viz.* section 1.

Referring to those Regulations, it is quite clear that they were not in force in the Assam Valley Districts. These districts were conquered in the year 1826. After their conquest, the upper portion was granted to certain Chiefs who were to govern them in accordance with the conditions of certain treaties concluded with them: see Aitchison's Treaties, Vol. I, page 126. The Government of the lower portion was assumed by the E. I. Company:—The administration of justice in these provinces was entrusted to certain officers appointed by the Governor-General in Council. They were never brought within what were called the Regulation districts of the Presidency of Fort William. The whole of Upper Assam, for certain reasons,

to which it is not necessary to refer here, was gradually brought under the British rule, and the same system of administration of justice was introduced there as was in force in Lower Assam. By a Government Resolution of 1834, it was directed that the Commissioner of Assam shall, from the 1st October next, be subject to the Courts of the Sudder Dewany and Nizamut Adawlut in all matters connected with the Civil and Criminal Administration, and to the Sudder Board of Revenue at the Presidency in revenue matters. The 4th paragraph of this Resolution contained the following direction: "The Assistants will continue to perform their duties at present entirely under the direction and control of the Commissioner." By the 5th paragraph it was directed that certain special rules, which had been sanctioned for the Sagur and Nurbudda Districts, should be forwarded to Captain Jenkins, who was then the local head in charge of the administration of the district, to enable him to submit a draft of rules which he might consider best suited for the district of Assam. These rules were subsequently framed and sanctioned by the Governor-General in Council, and I shall refer to them hereafter.

It is clear from Regulation I of 1829, by which the office of Commissioner of Revenue was created, that it was not the intention of Government to extend to Assam the system of administration of justice prevailing in the Regulation Districts. It has been contended before me that by the Regulation in question a Commissioner of Assam was appointed with powers similar to the Commissioners in the Regulation Districts constituted by it. This contention is not correct, because the Commissioners of Revenue and Circuit, constituted by the Regulation in question, and vested with the powers recited in s. 4, were the Commissioners enumerated in s. 2. Assam is not one of the districts recited in this section. Section 9 says, that the Commissioners of Arracan and Assam shall possess and exercise within the districts of Bengal, which are by this Regulation attached to their respective divisions, the same powers as belonged to the Commissioners of Cuttack, modified as above. By this provision the Commissioners of Arracan and Assam, who were not appointed under the provisions of Regulation I of 1829, and

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whose powers were not defined by s. 4 of the Regulation, were declared to be *ex officio* Commissioners in certain Regulation Districts, *viz.*, Chittagong, Noakhally, Sherepore and Sylhet, exercising the power in these districts defined by s. 4. But so far as Arracan and Assam were concerned, they were not appointed under the provisions of Regulation I of 1829, and their powers were not defined by s. 4. This Regulation, therefore, instead of showing that Assam was brought in any respects within the Regulation Districts, shows just the contrary.

Then next Act passed by the Governor-General in Council relating to Assam was Act II of 1835. This Act only embodied the provisions of the Government resolution already referred to. It declared "that the functionaries who are or may be appointed in the provinces of Assam * * * * * * be henceforth placed under the control and superintendence in civil cases of the Court of the Sudder Dewany Adawlut, in criminal cases of the Court of the Nizamut Adawlut."

Then rules for the administration of Civil and Criminal justice in Assam were from time to time framed. The last set of rules on this subject were prepared and sanctioned in the year 1847. They form a complete Code providing for the trial of all kinds of suits. By the 9th rule, the assistant in charge of a district was empowered to try, in his capacity of Collector, suits for arrears of rent or undue exactions of rent. These rules and not any of the regulations mentioned in the repealing section of Act X of 1859, *i.e.* s. 1, were in force in Assam in 1859. It is therefore clear that the provisions of Act X of 1859, which were intended to replace the Regulations repealed by s. 1, were intended to apply only to the districts in which those Regulations were in force. Those provisions of Act X of 1859 which deal with the subject of relative rights of landlords and tenants cannot, therefore, apply to the Assam Valley Districts. These reasons are sufficient to warrant the conclusion that s. 6 of Act X of 1859 at least is not applicable to the districts in question.

It seems to me further that the provisions of Act X of 1859, which were intended to carry out the second and the third

objects mentioned in its preamble, also do not extend to the Assam Districts.

The second object was to extend the jurisdiction of Collectors. I have shown above that in 1859 there were no such officers as "Collectors" in existence in Assam. The assistants in charge of districts only *exercised* the powers of Collectors. If by the use of the word "Collectors" in Act X of 1859 the Legislature had intended to include these officers, we should have found in the Act an interpretation clause to that effect.

Then as regards the last object, it appears to me from s. 67 of Act of 1859, that the provisions relating to it were not intended to apply to Assam. Act X of 1859 does not contain any provision relating to the examination of witnesses, for procuring their attendance, &c. The section referred to above provided that the provisions of Regulations and Acts and all other rules for the time being in force relating to the subjects mentioned above in *cases before the Civil Court in the Presidency of Bengal*, shall, with a certain exception, apply to suits under Act X of 1859. The section does not refer to the Assam Rules on the subject. It is therefore clear to me that the procedure laid down in Act X of 1859 for the trials of suits under that Act, was not intended to apply to similar suits in Assam.

Furthermore, if it had been the intention to extend Act X of 1859 to Assam, we should have found in the repealing section a provision for the repeal of the Assam Rules in force in 1859 relating to the trial of suits similar to those which were declared exclusively cognizable by the Collectors of land revenue under s. 23 of the Act. Then, again, by Act XIV of 1863, Act X of 1859 was amended so far as it related to the territories under the Government of the Lieutenant-Governor of the North-Western Provinces. The 19th section of this Act provides that it shall be lawful * * * * * for the Lieutenant-Governor of the North-Western Provinces to extend Act X of 1859 to any territories under his government in which the said Act was not then in force. This section does not give to the Lieutenant-Governor of Bengal any such power.

If Act X of 1859, when it was passed, was intended to extend to the whole of the territories under the Lieutenant-Governor

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of the North-Western Provinces and Bengal, this provision would not have been necessary. It is clear to me, therefore, that it was intended when it was passed to apply only to what are called Regulation Districts.

Then the next question is, whether this Act has been, since 1859, extended to Assam. The only notification that I have been able to trace on this subject is one of the Bengal Government dated 28th May 1864. It is published in the *Calcutta Gazette* of that year, page 1133. It says: "For carrying out the provisions of Acts VIII and X of 1859, the officers employed in the Civil Administration of Assam and Chota-Nagpore Division are hereby vested with the following powers." Then certain officers are vested with the powers of Zillah Judge, of a Collector and of a Deputy Collector. This notification does not purport to extend the provisions of Act X of 1859 to Assam. It assumes that that Act is in force there. If it be assumed even that it was intended to extend the Act to Assam, then the notification cannot be acted upon, because it was not in the power of the Lieutenant-Governor of Bengal to extend the Act by a simple notification. There is no provision to that effect in Act X of 1859, and in the subsequent Act of 1863, referred to above, no such power was given to the Lieutenant-Governor of Bengal.

For these reasons I am of opinion that Act X of 1859 is not in force in the Assam Valley Districts. As upon the other questions raised in this appeal, the learned Judges who heard this case first are agreed that if Act X of 1859 is not in force in the Assam Valley Districts, the judgment of the lower Appellate Court should be reversed, and the plaintiff's suit decreed, the result is that a decree should be made in this Appeal in accordance with that opinion. Accordingly, the judgment of the lower Appellate Court is reversed, and the plaintiff's suit is decreed with costs.

Appeal allowed.

PRIVY COUNCIL.

E. D. SINCLAIR (PLAINTIFF) *v.* L. P. D. BROUGHTON, ADMINISTRATOR-GENERAL OF BENGAL, ADMINISTERING THE ESTATE OF HENRY TOMBS, DECEASED (DEFENDANT).

P. C.*
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May 12, 16 *and* 17, *June* 23.

[On appeal from the Court of the Judicial Commissioner of Oudh and from the Court of the Commissioner of the Lucknow Division.]

Liability of public servant for injury done by his act, illegal though bonâ fide—Act XVIII of 1850—*Protection of Judicial Officers—Cantonments Act* (*XXII of* 1864) *s.* 11—*Lunatic Asylums Act* (*XXXVI of* 1858) *s.* 4.

Act XVIII of 1850 is for the protection of Judicial Officers, acting judicially, and of officers acting under their orders.

An officer commanding in Cantonments, acting *bonâ fide* in the discharge of his public duty, and under the belief that a person was dangerous by reason of insanity, caused him to be arrested, in order that he might be examined by medical officers, and caused him to be detained in his house for that purpose, he not being a dangerous lunatic. The medical officers, while reporting him sane, recommended that he should be placed under the observation of the civil-surgeon of the station, for which purpose the same officer caused his further detention. The Commanding Officer, who under Act XXII of 1864, s. 11, had control and direction of the police in the Cantonment, did not proceed, or intend to proceed, under s. 4 of Act XXXVI of 1858.

Held, that, although his belief might have justified the Commanding Officer, if he had proceeded under the provisions last mentioned, yet he not having done so, and not having any legal authority for what he had done, was not protected from liability in respect of the above acts.

APPEAL, *in forma pauperis* and by special leave, from a decree of the Judicial Commissioner of Oudh (17th November 1874,) which dismissed the plaintiff's suit, reversing on appeal a decree of the Commissioner of the Lucknow division (2nd July 1874). The latter decree in part maintained, and in part altered, a decree of the Civil Judge of Lucknow (12th May 1874,) reducing the damages thereby awarded to the plaintiff.

* *Present:* SIR B. PEACOCK, SIR M. E. SMITH, SIR R. P. COLLIER, and SIR J. MELLOR.

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Appeal, also, against the Commissioner's decree in respect of such reduction of damages.

The principal question was whether protection was given to the Officer Commanding in a Cantonment, from liability in respect of acts done by him in the discharge of his duty, and *bonâ fide*, but not in due course of law, in restraint of the liberty of the plaintiff, appellant.

The plaintiff, who shortly before bringing this suit in February 1873, was employed as an Accountant in the Department of Public Works at Lucknow, sued General Tombs, Commanding the Lucknow Division, and therefore Commanding in the Lucknow Cantonments, for Rs. 25,000 for damages for wrongfully causing him to be confined on the 1st, 2nd, and 3rd November 1872 in his house at Lucknow. For the defence (which the Government of India undertook under ss. 69, 70 and 71 of Act VIII of 1859) the defendant alleged in his written statement that he had acted *bonâ fide* for the public safety, believing the plaintiff to be dangerous by reason of insanity, actual or impending.

The defendant dying shortly after, his estate was represented by the Administrator-General of Bengal, who was made defendant on the record. The facts are stated in their Lordship's judgment.

The issues settled on the 24th February 1874 in the Court of the Civil Judge of Lucknow, Mr. F. Lincoln, were the following:—

(1) Was there a false imprisonment? (2.) If so, can the defendant justify it? (3.) Was the defendant, as the Officer Commanding in Cantonments, competent to take up the duties of the police under s. 11 of Act XXII of 1864(1)? (4.) Was the defendant authorized under Act XXXVI of 1858 (2) or otherwise, to make over the plaintiff to the Cantonment Magistrate?

(1) Act XXII of 1864 (Cantonments) s. 11 enacts that "the administration of the Police, within the limits of any Cantonment in which there shall be a Cantonment Magistrate, shall be vested in the District Superintendent, subject to the general control and direction of the Commanding Officers of such Cantonments."

(2) Act XXXVI of 1858 (Lunatic Asylums,) s. 4 enacts that "it shall be the duty of every Darogah or District Police Officer to apprehend and send to the Magistrate all persons found wandering at large within his district who are deemed to be lunatics, and all persons believed to be

The rest of the issues related to the treatment of the plaintiff and to the damages.

The Civil Judge found that the confinement had taken place, and that no formal procedure had been observed; that the opinion of two medical officers, deputed by General Tombs to examine the plaintiff, was certified by them to the following effect:—

"The undersigned, after having carefully examined Mr. Sinclair, do not consider that they are justified in giving a decided opinion on the case until it has been longer under their observation. They consider it necessary to recommend that Mr. Sinclair be kept under European guard until his case is decided on." "(Sd.) A. GUTHRIE, Surgeon, 8th R. A. H. SCOTT, M. D., Staff-Assistant Surgeon." He also found that the plaintiff was sent under a guard to the Cantonment Magistrate's Court.

In the opinion of the Judge neither of the acts above mentioned, nor any other law, gave authority for these proceedings. It was, he thought however, clear that the defendant had not acted under any personal feeling against the plaintiff, nor had the latter suffered any violence. The damages were assessed at Rs. 3,000.

The Commissioner of the Lucknow division, on appeal, upheld the decision, reducing the damages to Rs. 300, and disallowing costs on Rs. 2,700, the difference between the sums decreed in the Original and Appellate Courts.

The Judicial Commissioner of Oudh, on appeal, reversed the decrees of the lower Courts. His opinion was, that if by law a duty was imposed upon a person, the law protected him in the *bonâ fide* performance of it. On General Tombs, as the officer commanding in cantonments, a duty had been imposed to act upon his belief that the plaintiff was dangerous by reason of insanity. Upon that belief he acted *bonâ fide*. The Judicial Commissioner was, therefore, of opinion that the defendant was not liable for a wrong that had been unintentionally done.

dangerous by reason of lunacy." The Magistrate is to examine, with the assistance of a medical officer, any person so apprehended, and may issue a certificate and order his reception in a lunatic asylum.

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On this appeal the appellant appeared in person.

Mr. *R. V. Doyne* and Mr. *J. T. Woodroffe* for the respondent.

The material part of the appellant's argument was, that the restraint to which he had been subjected was not warranted by law. General Tombs, not having acted in a judicial capacity, was not protected by Act XVIII of 1850, and no law protected an executive officer under such circumstances. He also urged that the continuing to confine him was not a *bonâ fide* act.

For the respondent it was argued that the Indian Courts having found *bona fides* on the part of General Tombs, that question was no longer open, and that officer was brought either within the protection of the rule declared by this Committee in the case of *Spooner* v. *Juddow* (1), or within the protection of Act XVIII of 1850. General Tombs, as the officer commanding in the Cantonment, had the general control and direction of the police administration within it, under Act XXII of 1864, s. 11, referring to Act V of 1861. He had to exercise a discretion upon the question, whether it was his duty to apprehend Mr. Sinclair, when the conduct exhibited by the latter, on the 1st November 1872, was brought to his notice. That section required the apprehension by the police of any person believed to be dangerous by reason of lunacy; and General Tombs, as the proper officer, had been put in motion upon grounds that were reasonable, and he had acted *bonâ fide* in the course of his public duty. This was enough to exonerate him. It was all that was necessary for his protection. Whether this exoneration could take place under Act XVIII of 1850—the act of discretion required on the part of the police officer under Act XXXVI of 1858, s. 4 being, it was argued, of such a character that it might be called "quasi-judicial"—was next discussed; and it was contended that, if the operation of Act XVIII of 1850 should be held to be restricted to judicial officers, and to those who acted under their orders, still the defendant was protected. He was within the protection of the rule that "if parties *bonâ fide*, and not absurdly, believe that they are acting according to law, they

(1) 4 Moore's I. A., 353.

are entitled to the special protection which the legislature intended for them, although they have done an illegal act" This was declared in the judgment in *Spooner* v. *Juddow* (1), where it was said that there could be "no rule more firmly established." General Tombs had taken all proper steps to enable him to form a just belief, and he had acted upon it *bonâ fide*, thus bringing himself within the protection cast over subsequent error. Reference was then made to the passing of Act XVIII of 1850, "for the greater protection of Magistrates and others acting judicially," after the decision in *Calder* v. *Halket* (2); and it was argued that when the law had imposed upon a public servant a duty requiring the exercise of a discretion, in the *bonâ fide* exercise whereof he erred, acting in an illegal manner and causing damage to another, such officer could not be held responsible in a suit by the person injured.

To secure for him this protection it was not necessary that the public servant should be acting as a Judge, *sedente curiâ*. In support of this proposition reference was made to the judgment in *Ferguson* v. *The Earl of Kinnoul* (3), where the liability of the body which in that case had violated the law, to the injury of the complainant, was expressly placed upon their not having had vested in them any discretion whatever to refrain from performing the ministerial duty, imposed upon them by law, for the omission whereof they were held liable in a suit. It was further argued that when public duties required the exercise of judgment, as to whether a certain course should be adopted by an executive officer, the forming such a judgment was for this purpose "acting judicially" within the scope of Act XVIII of 1850, which referred to magistrates, who, as a class, had many executive functions bordering on their judicial powers. Reference was made to *Hughes* v. *Buckland* (4); *Lucas* v. *Nockels* (5); *Ouseley* v. *Plowden* (6). It was further contended that, though the confinement might

(1) 4 Moore's I. A., 353.
(2) 3 Moore's P. C., 28; S. C. 2 Moore's I. A., 293.
(3) 9 Cl. and Fin., 251.
(4) 15 M. and W., 346.
(5) 4 Bing., 729; 10 Bing., 157.
(6) 1 Doulnois, 145.

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have been with a view to the obtaining a medical opinion as to Mr. Sinclair's state of mind, and not with a view to sending him to the magistrate according to the direction in s. 4, yet the intention of General Tombs did not deprive him of any protection to which he would otherwise have been entitled; for no practical difference in the custody of the plaintiff resulted. This was in consequence of the absence, shown at the hearing of the suit, of the magistrate of the district, to whom the plaintiff could not, even if General Tombs had purposed to send him, have been sent.

Lastly, it was argued that no doctrine of agency could link the conduct of General Tombs with the acts and omissions of the Brigade Major who had delayed the transmission of the medical officer's report to the former, and also treated the summons as a warrant. Reference was made to Addison on Torts, 665, (fifth edn.) and to *Nicholson* v. *Mounsey* (1).

The appellant was heard in reply.

On a subsequent day, (23rd June,) their Lordships' judgment was delivered by

SIR B. PEACOCK.—This is an appeal brought *in formâ pauperis* by the appellant Mr. Edward D. Sinclair, by special leave of Her Majesty in Council, from a judgment of the Judicial Commissioner of Oudh, dated the 19th November 1874, in a suit brought by the appellant in the Court of the Civil Judge of Lucknow against the late Major-General Sir Henry Tombs, and also from a judgment of the Commissioner of Lucknow in the same suit.

The suit was commenced as far back as the year 1873, and was for the recovery of damages laid at Rs. 25,000, alleged to have been sustained by the plaintiff in consequence of the defendant's having put him under an unlawful arrest of European soldiers of Her Majesty's Royal Artillery, and having wrongfully confined him in his own premises for three successive days, *viz.*, from the 1st to the 3rd of November 1872, and having caused violence to be used against his person and property. The plaintiff also complained that the defendant, subsequently to the first step, *viz.*, on Sunday, the 3rd November 1872, forcibly delivered the plaintiff into the custody of the late Lieutenant Gubbins, the then Cantonment Magistrate.

(1) 15 East, 384.

The defendant, who was the officer in command of the military cantonments in Lucknow, put in a written statement, and thereby alleged that at about 8 A.M. on the 1st November 1872 he was riding towards his house in the cantonments, when he noticed a flag flying from the thatched roof of a house in which plaintiff resided, and saw plaintiff walking about in a very strange and excited manner; that on being informed by Mrs. Gully (wife of Captain Gully, of the Royal Artillery), who resided in the house opposite that of the plaintiff, that she was alarmed at the conduct of the plaintiff, and on being asked by Mrs. Gully for protection against the plaintiff (Captain Gully being absent from the house), defendant caused due inquiry to be made regarding the plaintiff, and, on information received by him, he directed two medical officers, Doctors Guthrie and Scott, to examine the plaintiff as to his soundness of mind; and that the medical officers, on examination of the plaintiff, considered it necessary to recommend that he should be kept under an European guard until they could form a decided opinion as to his sanity. He further stated that, in the absence of the Cantonment Magistrate from the station on the 1st and the 2nd November 1872, defendant, as officer commanding the cantonments of Lucknow, and consequently in general control of the police employed in the military cantonments (see Act XXII of 1864, s. 11), considered that he was bound and justified, in the interests of public safety, to act on the recommendation of the two medical officers aforesaid, and believing the plaintiff to be dangerous, by reason of lunacy, actual or impending, placed over plaintiff a guard of unarmed European soldiers, to prevent him doing harm to himself and others. That the substitution of unarmed European soldiers for native policemen was in accordance with the usual practice, in case of European lunatics, when European policemen are not available.

That on the return of Lieutenant Gubbins, the Cantonment Magistrate, to the station, on the 3rd November 1872, the plaintiff was made over in due course to the said Magistrate (s. 4, Act XXXVI of 1858), to be dealt with according to law, and that defendant was in no way concerned, nor could he be held

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responsible for any proceedings that might have taken place in the Court of the Cantonment Magistrate, or subsequently.

That defendant acted throughout in perfect good faith, and in the interests of public safety, and that no violence was used by the defendant's order, or at his request.

That the amount of damages claimed by the plaintiff was excessive, with reference both to the plaintiff's late position in life, and the nature of the alleged wrong.

The case was tried in the first instance by the Civil Judge of Lucknow, who gave judgment for the plaintiff, and assessed the damages at Rs. 3,000.

From that decree the defendant appealed to the Commissioner of Lucknow, who upheld the decision, but reduced the damages to Rs. 300, and ordered the plaintiff to pay the defendant's costs on Rs. 2,700, the difference between the Rs. 300 and the sum awarded by the Civil Judge.

It appears that, on the morning of the 1st of November 1872, the defendant, who was then the Commanding Officer of the Cantonment at Lucknow, having reason to believe that the plaintiff was a dangerous lunatic, caused him to be confined on his own premises under a guard of unarmed European soldiers of Her Majesty's Royal Artillery, and caused him to be soon afterwards visited and inspected against his will by Drs. Guthrie and Scott, in order to ascertain the state of his mind. Those gentlemen on the same day reported that, having carefully examined the plaintiff, they did not consider themselves justified in giving a decided opinion on the case until it had been longer under their observation, and that they considered it necessary to recommend that the plaintiff should be kept under a European guard until the case should be decided on. The defendant in his written statement admits that he felt himself bound, in the absence of the Cantonment Magistrate, to act upon the recommendation of the medical officers, though he there states his case as if the recommendation had preceded the confinement, which was not the fact. However, the plaintiff was kept under confinement from the 1st to the 3rd of the month, and the medical officers were ordered to visit him during his confinement, and did so, against his will.

The defendant signed on the report a memorandum as follows:—

"Mr. Sinclair is a civilian, not belonging to the cantonments, and it is hard on the troops to have to furnish a guard over him. I hope, therefore, Drs. Guthrie and Scott will not be long in making up their minds.

"I believe Mr. Sinclair's late chum, 'Mr. Reid,' could prove the insanity at once.

"Dr. Cannon is quite willing to receive him, and it is my opinion then that he should be observed before being sent to Bhowanipoor and not in cantonments.

"Make the substance of this known to Dr. Guthrie.

"Mr. Sinclair must be subsisted by the Cantonment Magistrate."

It is clear that the District Magistrate, or the officer exercising the powers of the District Magistrate, would have had jurisdiction in the case if the plaintiff had been taken before him under Act XXXVI of 1858, s. 4. It is clear, however, from the memorandum signed by the defendant, that he intended to keep the plaintiff under the European guard until the medical officers could decide on the case, a detention which he was not authorized to inflict.

The report of the medical officers, with the memorandum thereon signed by the defendant, was delivered to Captain Beadon, the Brigade Major, and on the following day, Saturday, the 2nd November, Drs. Guthrie and Scott forwarded a further report to the effect that they considered the plaintiff perfectly sane, but that they recommended him to be placed under the observation of the Civil Surgeon. This recommendation, it must be observed, was quite in accordance with the opinion of the defendant expressed in the memorandum on the first report of which he directed that the substance should be made known to Dr. Guthrie. The certificate is, unfortunately, not forthcoming, and has not been accounted for, but it appears from the evidence of Major Beadon, the Brigade Major, that he forwarded it on the 2nd to the Officiating Deputy Commissioner, with a docket, which was in the following terms:—

"No. 4,071. Lucknow Brigade Office, 2nd November 1872.

"Forwards medical certificate regarding Mr. Sinclair's state of mind, and to request that very early steps may be taken to remove him to the charge of Civil Surgeon.

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"Mr. Sinclair is at present under restraint and in charge of a military guard.

"(Sd.) R. BEADON, *Capt*,
"*Brigade Major.*

"To the Officiating Deputy Commissioner, Lucknow."

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In answer to that request Major Beadon received from the Deputy Commissioner the following communication :—

"No. 4928, 2nd November 1872.
To the Brigade Major, Lucknow.

"Sir,

"In reply to your memorandum No. 4071, dated 2nd instant, I have the honor to state that the medical officers who have examined Mr. Sinclair, having reported him to be perfectly sane, I should not be justified in placing him under restraint, or under observation, against his will, of the Civil Surgeon. The law relating to lunatics is clear on this point, that a Magistrate has no power to act against any person (under Act XXXVI of 1858), unless that person has been declared by medical authority lunatic.

"2. I therefore regret that I cannot comply with your request to move Mr. Sinclair to the charge of the Civil Surgeon.

"4. The Cantonment Magistrate will be directed to give attention to Mr. Sinclair's proceedings, and, should occasion require, to bind him over to keep the peace, *and consign him to custody should sureties not be forthcoming*

"I have, &c.,
R. H. DEMONTMORENCY,
"*Officiating Deputy Commissioner.*"

"No. 4929, 2nd November 1872."

"Copy of the foregoing forwarded to the Cantonment Magistrate, Lucknow, for compliance with reference to the last paragraph.

J. H. PHILLIPS, Head Assistant for
"R. H. DE MONTMORENCY,
"*Officiating Deputy Commissioner.*"

Major Beadon states his belief that he received that communication on Sunday, the 3rd of November, about 11 o'clock, but that, as he never did business on Sunday, he did not show the letter to the defendant on that day, but did so on the following Monday.

The plaintiff was not released from confinement either on the second report of the medical officers received by Major Beadon on the Saturday, or on the receipt of the letter from the Deputy

Commissioner, at about eleven o'clock on the Sunday. On that day, however, a summons was issued by the Cantonment Magistrate directed to the plaintiff, requiring him to appear at one o'clock on that day, to enter into his personal recognizance in Rs. 500, and two sureties in Rs. 250 each, to keep the peace for six months. That summons was delivered to and treated as a warrant by Major Beadon, who forwarded it on the same day to the officer commanding the Royal Artillery, with a letter, of which the following is a copy :—

BENGAL SECRETARIAT LIBRARY

"Memorandum, No. Urgent.

"From the Brigade Major to the Officer Commanding Royal Artillery.

Lucknow, 3rd November 1872.

"Has the honor to request that Mr. Sinclair, at present under a guard of the R.A., may be taken at once before the Cantonment Magistrate, in accordance with the enclosed warrant, when further orders will be given to the N. C. officer in charge as to his disposal.

"RICHARD BEADON, *Capt.*,
"*Brigade Major.*"

The plaintiff was accordingly detained in confinement in his own house until about two or three o'clock in the afternoon, when he was taken by the European guard against his will before the Cantonment Magistrate, not to be dealt with as a dangerous lunatic, but in consequence of the summons, and was committed for want of bail. Subsequently the Colonel commanding the European Artillery addressed the following letter to the defendant :—

Lucknow, 3rd November 1872.

"Has the honor to report, for the information of the Major-General commanding, that Mr. Sinclair has been removed to the Magistrate's office, as herein directed, but considerable delay has taken place in doing this, owing to Mr. Sinclair refusing to be removed, and refusing to put on his clothes.

"The bungalow in which Mr. Sinclair resided is not in charge of any servant, and there are several articles of his property there. A gunner has been left to the care of these things, as also two ponies, supposed to be Mr. Sinclair's, till further orders are received as to their disposal.

NEIL MACKAY, *Col.*,
"*Commanding R.A., Oude Division.*"

It was contended by the defendant in his written statement that he was not liable for the detention of the plaintiff after he

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was made over to the Cantonment Magistrate, and the first two Courts very properly adopted that view. It does not appear, however, upon whose information and complaint the summons was obtained, and their Lordships cannot help remarking upon the great irregularity of the forcible execution of it as if it were a warrant. The defendant, however, is not liable for any force used in compelling the plaintiff to go before the Magistrate.

Their Lordships must also point out that Colonel J. Reid, the Commissioner, in his judgment, has referred to several matters which do not appear in evidence. Their Lordships have, however, entirely rejected those statements from their consideration, and have not been in any manner influenced by them.

Sir Henry Tombs having died, the Administrator-General of Bengal, as administrator of his estate, appealed to the Judicial Commissioner of Oude, who, on the 17th November 1874, held that an officer commanding in cantonments is vested within cantonments with all the police powers which a Magistrate of a district may exercise within his district, and that as there was a duty imposed on the defendant, as officer commanding in cantonments, to take action in consequence of his *bonâ fide* belief that plaintiff was dangerous by reason of lunacy, actual or impending, and that as the action taken was in perfect good faith, and in performance of the duty thus imposed, the defendant was not liable at law for damages in consequence of any wrong that might have been unintentionally done to plaintiff.

It may be taken as a fact, upon the evidence and upon the findings both of the Civil Judge and of the Commissioner, that the plaintiff was not, at the time when the acts complained of were committed, a dangerous lunatic. At the same time, there can be no doubt that the defendant acted *bonâ fide* in the discharge of a public duty, and under the belief that the plaintiff was dangerous by reason of lunacy.

That belief might have justified the defendant, who as commanding officer of the cantonment had the control and direction of the police, in directing proceedings to be taken by the police under the 4th section of Act XXXVI of 1858, but it is clear that the defendant did not proceed, or intend to proceed, under that Act.

The Commissioner in his judgment, referring to Acts XXII of 1864 and XXXVI of 1858, says :—

"It is not alleged that the defendant proceeded under either of the Acts above cited, or, indeed, under any particular law, but it is contended that he felt bound to take immediate steps himself, in the absence of the Cantonment Magistrate and the Magistrate of the district, and that he acted as a sensible and considerate man, and that subsequent inquiry into the legality of his proceedings shows that they were justifiable by the law."

The Legislature has been careful in providing for the protection of lunatics, and it would be extremely dangerous if the doctrine enunciated by the Judicial Commissioner could be held to be law. He draws no distinction between a mistake in fact and a mistake in law, if *bonâ fide*. He says: "The main point "raised in the appeal to this Court is one of principle, namely, "when a public officer, who is bound by his duty to take some "action, fully intending in good faith to do what is right, makes "a mistake and causes wrong, is such officer liable to be mulcted "in damages by a Civil Court?" And he held that he is not. Again, he says: "Holding, then, that there was a duty imposed "on the defendant, as the officer commanding in cantonments "to take action, in consequence of his *bonâ fide* belief that the "plaintiff was dangerous by reason of lunacy, actual or impend-"ing, and that whatever action was taken was taken in perfect "good faith, and in performance of the duty thus imposed upon "him, I am of opinion that the defendant was not liable at law for "damages in consequence of any wrong that may have been "unintentionally done to the plaintiff. I am of opinion, there-"fore, that a verdict should have been given for the defendant."

There is no law which authorizes the police or a Magistrate in the exercise of police duties, or an officer in command of a cantonment, in consequence of a *bonâ fide* belief that a person is dangerous by reason of actual lunacy, to put him into confinement in order that he may be visited and examined by medical officers, and to keep him in confinement until such officers can feel themselves justified in reporting whether the person is a dangerous lunatic or not; *á fortiori*, this cannot be done in the case of a *bonâ fide* belief of danger from impending lunacy. The defendant had no authority for causing the plaintiff to be put under restraint

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for such a purpose, nor had he, after the report of the medical officers that the plaintiff was perfectly sane, any colour of authority for keeping him under restraint in order that he might be removed from the cantonment, and placed under the observation of the civil surgeon, even though recommended so to do by the medical officers.

Neither the police, nor a Magistrate in the exercise of police duties, could, under Act XXXVI of 1858, have had any colour for doing that which the defendant caused to be done.

The appellant appeared in person, and argued his case with considerable ability.

The respondent appeared by Counsel, who, amongst other arguments, contended that the defendant was protected by Act XVIII of 1850.

But there is no foundation for that contention. That Act was for the protection of judicial officers, acting judicially and officers acting under their orders. It is clear that the defendant was not a judicial officer, and that he did not act judicially. Mr. Woodroffe, one of the learned Counsel for the defendant, cited many authorities, and amongst others, *Calder* v. *Halket* (1); *Spooner* v. *Juddow* (2); *Hughes* v. *Buckland* (3); and *Ferguson* v. *Lord Kinnoul* (4); but none of those authorities have any bearing upon the present case. He also referred to *Lucas* v. *Nockels* (5); but there is a great distinction between that case and the present.

The plaintiff has complained before their Lordships that he was not allowed by the Civil Judge to give his own evidence in chief on his own behalf, and that he was merely examined in the nature of cross-examination on behalf of the defendant. It does not appear that the Judge refused to allow the plaintiff to give evidence as a witness for himself; but, assuming that the plaintiff is correct in his statement, the fact would be merely a ground of appeal from the Civil Judge, and such appeal is expressly

(1) 3 Moore's P. C., 28; S. C. 2 Moore's I. A., 293.
(2) 4 Moore's I. A, 353.
(3) 15 M. and W., 346.
(4) 9 Cl. and Fin, 251.
(5) 4 Bing, 729, 10 Bing, 157.

excluded from the leave given by the order of Her Majesty in Council.

The plaintiff is entitled to a decree, and the only question remaining is as to the amount of damages to which he is entitled.

Their Lordships see no sufficient reason to alter the judgment of the Commissioner of Lucknow in that respect. They will, therefore, humbly advise Her Majesty to reverse the decree of the Judicial Commissioner, and also to reverse the judgment of the Commissioner of Lucknow as regards the order that the plaintiff shall pay the costs on Rs. 2,700, being the difference between the Rs. 3,000 awarded by the first Court, and the Rs. 300 awarded by the Commissioner, but to affirm the last-mentioned judgment in other respects. The respondent must pay the costs of this appeal. *Appeal allowed.*

Solicitor for the respondent: Mr. *H. Treasure.*

APPELLATE CIVIL.

Before Mr. Justice McDonell and Mr. Justice Field.

MANICKYA MOYEE (PLAINTIFF) *v.* BORODA PROSAD MOOKERJEE AND ANOTHER (DEFENDANTS).*

1882 *July 31.*

Principal and Surety—Agreement to Mortgage, Assignment of—Bond of Indemnity—Guarantee—Interest—Appeal—Respondent—Adding Parties—Civil Procedure Code, Act (XIV of 1882), s. 559—Limitation Act (Act XV of 1877).

Liability of parties discussed and form of decree given in a case where, by an agreement in writing, one of the defendants, in consideration of money lent to him by *B*, the other defendant, agreed to execute a mortgage to *B* containing the usual covenants (in default the agreement to stand as a mortgage), and *B* assigned the agreement to the plaintiff, guaranteeing by bond of even date the payment of the principal and interest specified in the agreement.

The discretionary power of directing a person to be made a respondent, conferred on the Appellate Court by s. 559 of the Civil Procedure Code, is not limited by any provision in the Limitation Act (Act XV of 1877).

* Appeal from Original Decree No. 16 of 1881, against the decree of Baboo Krishto Mohun Mookerjee, Second Subordinate Judge of the 24-Pergunnahs, dated the 2nd September 1880.

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The facts of this case are set out in the judgment.

The lower Court fixed the following issues:—(1). Is the suit bad by reason of misjoinder? (2). Is the plaintiff entitled to have a lien declared on the properties in suit? (3). Is the plaintiff entitled to costs and the interest claimed? (4). What is the extent of Boroda Prosad's liability under the indemnity bond? The Munsiff found the first three issues in favour of the plaintiff. On the fourth issue he said:—

"It is said that the defendant Boroda Prosad has not only guaranteed the payment of the principal and interest under the agreement to mortgage, but also covenanted, under the indemnity bond, to pay interest at the rate of 18 per cent. from the date of the agreement to mortgage to the date of realization. In the first place I would observe that there are two things in the indemnity bond which render it ambiguous; and a portion of it is admittedly meaningless, under the rules of grammatical construction. It is said that the particle "thereof" has been interpolated for "hereof;" but there is no evidence to that effect. The words "date of payment" may be construed to mean "due date" or "date of realization." Under such circumstances I shall put such a construction on the document as under the nature of things would render it plausible and consistent. Boroda Prosad sold his interest in the agreement to mortgage. Rs. 38,000 and odd were due under the agreement. He gave up Rs. 3,000 and odd, and effected the transfer for Rs 35,000. If it is contended that under the indemnity bond Boroda Prosad covenanted to pay interest at the rate of 18 per cent., I would say there was no consideration for such an agreement. Why should Boroda Prosad pay more than what was due under the agreement to mortgage? He assigned over his interest at a disadvantage, and it is not fair to make him liable for more than what was due under the original document. If he had made any such contract, it was a *nudum pactum*. I am, therefore, not inclined to render him liable for more than what is due under the agreement to mortgage."

The plaintiff appealed to the High Court.

Mr. *Evans*, Baboo *Srinath Doss*, and Baboo *Doorga Mohun Doss*, for the appellant.

The *Advocate-General* (Offg. *Mr. Phillips*), and Baboo *Rajendro Nath Bose*, for the respondents.

The following judgment of the Court (McDONELL and FIELD, JJ.) was delivered on the 25th of May by

FIELD, J.—In this case one Kali Dass Roy mortgaged certain property to Boroda Prosad Mookerjee by an instrument, dated

the 17th June 1878. This instrument was not a formal deed of mortgage; it was an agreement for mortgage only, but it was the intention of the parties that a formal mortgage deed should be subsequently executed. The agreement of the 17th June 1878 contained a provision that, until the formal mortgage deed should be executed containing all such covenants, provisions, stipulations, and agreements as are usually or properly introduced into mortgages of estates of a similar nature, the mortgage property should remain charged with the amount of the loan, and the mortgage agreement (which was correctly stamped under Act XVIII of 1869) should be considered as a deed of mortgage. Under the agreement the money lent on mortgage, together with interest at 18 per cent., was to be paid *within one year* from the 17th June 1878, and the agreement further provided that this interest was to be payable in four quarterly instalments, and that if any instalment was not paid on the due date, compound interest was to be allowed thereupon. The money lent or the interest was not paid within the year, and Boroda Prosad Mookerjee, on the 28th June 1879, transferred his interest in the mortgage to Manickya Moyee Chowdhrain, the plaintiff in the present suit. It is not necessary to refer further to the contents of the deed of transfer for the purposes of the present case.

Boroda Prosad Mookerjee, further, on the same date, executed an instrument of guarantee. This is in the common form of a bond, by which Boroda Prosad Mookerjee is held bound in the sum of Rs. 50,000 to be paid to Srimoti Manickya Moyee Chowdhrain; such bond to be void if the amount due upon the mortgage, together with the stipulated interest, be paid by or recovered from the mortgagor. This instrument recites the mortgage agreement executed by Kali Dass Roy in favor of Boroda Prosad Mookerjee, and the transfer of Boroda Prosad Mookerjee's interest thereby created to the plaintiff Manickya Moyee Chowdhrain. Then comes the condition of the obligation, and after this we have the following passage which is material to the questions which we have to decide in the present case:—

"Provided always, and it is hereby agreed and declared by and between the said Boroda Prosad Mookerjee and Srimoti Manickya Moyee Chowdhrain

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that, if the said Kali Dass Roy, or his heirs, executors, administrators, representatives or assigns does not or do not pay to the said Srimoti Manickya Moyee Chowdhrain, or her heirs, executors, administrators, representatives, or assigns amicably and without the institution of any suit, the whole of the said principal sum of Rs 32,000, and the simple and compound interest thereon according to the terms of the said indenture of mortgage at the rate of eighteen per cent per annum from the said 17th day of June 1878 to the *date of payment* within one year from the date THEREOF, the said Srimoti Manickya Moyee Chowdhrain or her heirs, executors, administrators, representatives, and assigns shall bring a suit or suits in the proper tribunal to enforce payment of the monies secured by the said indenture of agreement for mortgage, but if she or they fail to do so, then the said Boroda Prosad Mookerjee, or his heirs, executors, administrators, and representatives shall not be liable to the said Srimoti Manickya Moyee Chowdhrain or her heirs, executors, administrators, representatives or assigns for payment of any interest that may grow or become due on the said indenture of agreement for mortgage from the date on which under this proviso the said suit or suits ought to be brought, and the date on which the said suit or suits shall be actually brought; and that if under any decree that may be passed against the said Kali Dass Roy, or his heirs, executors, administrators, representatives or assigns in favor of the said Srimoti Manickya Moyee Chowdhrain, or her heirs, executors, administrators, representatives, or assigns on the said indenture of agreement for mortgage, *simple and compound interest be not allowed at the rate of eighteen per cent per annum, from the said 17th day of June* 1878 *to the date of payment*, the said Boroda Prosad Mookerjee, or his heirs, executors, administrators, and representatives, shall nevertheless be liable to pay to the said Srimoti Manickya Moyee Chowdhrain, or her heirs, executors, administrators, representatives and assigns *the difference between the amount which will be allowed by such decree for interest and the full amount of simple and compound interest according to the terms of the said indenture of agreement for mortgage*, from the said 17th day of June 1878 to the date of payment, minus the interest for the period between the date on which under this proviso the said suit or suits ought to be brought, and the date on which the said suit or suits shall be actually brought And lastly it is hereby expressly understood that upon this bond or obligation the said Srimoti Manickya Moyee Chowdhrain, her heirs, executors, administrators, representatives, and assigns shall be competent to recover from the said Boroda Prosad Mookerjee, his heirs, executors, administrators, and representatives, only the amount of the difference between what shall be recovered by the said Srimoti Manickya Moyee Chowdhrain, or her heirs, executors, administrators, representatives, and assigns on the strength of the said indenture of agreement for mortgage and transfer of mortgage from the said Kali Dass Roy, or his heirs, executors, administrators, representatives or assigns, and the said sum of Rs 32,000, and *simple and compound*

interest thereon according *to the terms of the said indenture of agreement for mortgage at the rate of eighteen per cent. per annum from the said 17th day of June* 1878 *to the date of payment*, subject to the agreement in the hereinbefore proviso contained."

It is contended before us that the word "thereof" in the commencement of this passage is a mistake for "hereof." This contention supposes that the word "hereof" suggested for substitution, is together with the six preceding words to be read with the verb "pay," thus "do not pay within one year from the date hereof;" but it appears to us that it is not necessary to substitute "hereof" for "thereof," because a sufficient sense is to be obtained from the passage as it stands if the word "thereof" be taken and construed with "interest thereon according to, &c.," in other words, be read as defining or describing the interest.

Having regard to the words "any interest that may grow or become due on the said agreement for mortgage from the date on which, &c.," and what immediately follows these words, we think that interest after and besides the interest for the year specified in the mortgage agreement was within the intention of the parties to the guarantee bond.

Then comes the essential passage, "if under any decree that may be passed against the said Kali Dass Roy simple and compound interest be not allowed at the rate of eighteen per cent per annum from the said 17th day of June 1878 to the date of payment, the said Boroda Prosad Mookerjee shall nevertheless be liable to pay to the said Srimoti Manickya Moyee Chowdhrain the difference between the amount which will be allowed by such decree for interest and the full amount of simple and compound interest according to the terms of the said indenture of agreement for mortgage from the said 17th day of June 1878 to the date of payment minus the interest, &c" It is contended before us that the words "date of payment," are to be construed to mean, not the due date of payment inserted in the mortgage agreement, namely, within one year from the 17th of June 1878, but the date on which the money may be or shall be realised, and it is further contended that inasmuch as it was stipulated between the original parties that the agreement for mortgage was to have the same effect as a formal mortgage deed containing the usual covenants, the original mortgagee is entitled to interest at eighteen per cent., and

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also compound interest calculated in the manner specified in the mortgage agreement; entitled, that is, in respect of the time (after the year allowed for payment by the mortgage agreement) during which the debt was not paid, because, if a formal mortgage deed had been executed, covenants securing the payment of such interest and such compound interest would have been inserted therein.

Now, so far as regards compound interest, we are not able to agree with this contention; but it does appear to us that if a formal mortgage deed had been executed between the original parties, it would have been a usual and ordinary covenant to insert in such a deed that interest shall be paid on the principal sum for any time during which such sum remained unpaid after the expiry of the year fixed for payment, at the rate of eighteen per cent., specified in the agreement; and it therefore appears to us that the original mortgagee was *primâ facie* entitled to recover interest at this rate until such principal sum were realized from the mortgagor.

We think that what was guaranteed by the guarantee bond was that interest would be recoverable upon the true construction or interpretation of the mortgage agreement.

But it is contended that inasmuch as the Subordinate Judge has decided that interest after the year is not recoverable at the rate of eighteen per cent., from the mortgagor Kali Dass Roy, the plaintiff is bound by that decision, and is precluded from recovering such interest from her assignor. It has also been pressed upon us that Kali Dass Roy ought to have been made a party to this appeal, and that the present defendant is entitled to say that unless and until Kali Dass Roy is a party to this appeal, it is unjust and inequitable to make him (the present defendant) liable for the further amount of interest, from liability for which Kali Dass Roy has been discharged by the decree of the Court below, because that decree was made in a suit to which the original parties to the mortgage, as well as the assignee of the mortgagee, have all been parties.

Two questions thus arise: (1.) If upon the true construction of the mortgage agreement we think the mortgagor liable to pay interest at eighteen per cent. after the year allowed for payment, can the assignee of the mortgagee recover this interest from his

assignor upon the guarantee, when such assignee has failed to recover such interest from the mortgagor? (2) Can the assignee recover such interest in this appeal, notwithstanding that he has not made the mortgagor a party to his appeal?

We think that, as to the *first* question, if the assignee had sued the mortgagor in a separate suit to which the mortgagee (assignor) was not a party, and had failed to recover the after interest, the guarantee bond would entitle the assignee to recover such interest from the assignor in a second suit subsequently brought on the guarantee against the assignor alone; but it is not so clear to us that he is equally entitled to recover in a suit to which all three are parties. The second question we do not propose to decide, as we think that the proper course will be to let the hearing of this case stand over, and to direct that Kali Dass Roy be made a party to the appeal. So far as regards Kali Dass, the time for appealing as against him has expired; but we think that this is a case in which we may reasonably exercise the discretion vested in us by s. 5 of the Limitation Act; and it may be quite possible that, apart from that section, we have power to direct that Kali Dass Roy be made a party to the appeal, inasmuch as the mortgagee, respondent, has in a way a right to relief over against him, and it is proper that all questions in dispute should be settled so as to prevent as far as possible further litigation.

It has been stated to us by the learned Counsel for the appellant that Kali Dass Roy was not made a party to this appeal because Boroda Prosad Mookerjee made common cause with him in resisting the plaintiff's claim; and the plaintiff cannot in consequence be supposed to show him much consideration, while at the same time she believes that upon the true construction of the contract of guarantee she is entitled to recover the after interest at eighteen per cent. in any event from him.

This is a question upon which we pronounce no opinion at the present stage of the proceedings. If this really were so, it may be a matter for consideration when we come to deal with the question of costs. All we say at present is that having regard to the fact that Kali Dass Roy, together with the mortgagee and the assignee of the mortgagee, were parties to the present pro-

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ceedings in the Court below, we think that the case should be so finally disposed of as to do complete justice between all parties.

The appellant will take steps within a fortnight from this date to serve notice upon Kali Dass Roy, and the usual time for his appearance will be allowed.

Kali Dass Roy having been made a party respondent to the appeal appeared by Baboo *Rash Behary Ghose*, who addressed the Court on his behalf.

The following judgment was delivered on the 31st July 1882, by

FIELD, J.—Kali Dass has now been made a party to the appeal, and we have heard Baboo Rash Behary on his behalf. The learned pleader has contended that Kali Dass has been improperly made a party to this appeal. His argument is based upon the rule of limitation applicable to the institution of appeals, and he contends that as the period for filing an appeal against his client has expired, it is not now competent to the Court to make him a respondent to the appeal. We think that s. 559 of the Code of Civil Procedure gives us full power to make him a respondent, and that the discretion conferred by that section is not limited by any provisions to be found in the Limitation Act. We may observe in the first place that s. 32 of the Code, which provides for adding parties in the Court of first instance, contains an express reference to s. 22 of the Limitation Act. No such express reference is contained in s. 559, and the language of s. 22 of the Limitation Act deals with *plaintiff* and *defendant*. There is no general clause, which provides that *plaintiff* shall include *appellant*, and *defendant*, *respondent*. Then again what is done under s. 559 is done not upon the application of the parties but by the Court *suo motu*. If a rule of limitation were applicable to s. 559, it would be in the power of the appellant to exclude the discretion of the Court by filing his appeal on the last day allowed by the Limitation Act for that purpose. We think, therefore, having regard to this consideration, that it was not the object of the Legislature to limit the operation of s. 559 by any rule of limitation, and we think that we had full power to direct that Kali Dass be made a respondent in this appeal. We entertain no doubt that Kali Dass is liable for interest at 18 per cent until the date of relization, and we shall direct a decree to be

made to the following effect: Interest at 18 per cent. will be allowed up to the date of the decree of this Court. That interest will be realized in the first instance from Kali Dass; and the original mortgagee, that is the assignor of the plaintiff, will be liable upon the guarantee bond only if the interest cannot be realized by the usual execution proceedings from Kali Dass. Having regard to all the circumstances of the case and the omission of Kali Dass as respondent, when the appeal was originally filed, we shall give no costs upon the additional interest now decreed. The total sum allowed by the decree will carry interest at 6 per cent. from the date of the decree of this Court to the date of realization.

Appeal allowed.

Before Mr. Justice Mitter, Offg. Chief Justice, and Mr. Justice Maclean.

JOY COOMAR AND ANOTHER (DEFENDANTS) *v.* BUNDHOO LALL (PLAINTIFF.)*

1882 *August* 9.

Evidence—Local Investigation—Judgment on facts observed by Judge but not proved.

In a suit respecting boundaries, the Munsiff, before settling the issues in the case, visited the locality, and in his judgment relied upon certain facts which had come under his observation during his visit. These facts were not proved by any evidence, and the Munsiff did not make any report as to them. The District Judge reversed the Munsiff's decision on the oral evidence given in the case, holding that he could not take notice of the facts observed by the Munsiff himself, and on which he had based his judgment.

Held, that though the result of the enquiry instituted by the Munsiff was not evidence according to the definition in the Evidence Act, it was a matter before the Court which might have been taken into consideration.

Held, also, that the Munsiff should have put the result of his investigation upon paper.

Mr. *Branson* and Munshi *Mahomed Yusuf* for appellants.

Baboo *Mokesh Chunder Chowdhry* and Mr. *Sandel* for respondent.

* Appeal from Appellate Decree No. 287 of 1882 in Rule No. 569 of 1882, against the decree of J. Tweedie, Esq., Officiating Judge of Gya, dated the 16th November 1881, reversing the decree of Baboo Mohendro Lal Ghose, Second Munsiff of that district, dated the 27th June 1881.

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THE facts of this case sufficiently appear from the judgment of the Court (MITTER and MACLEAN, JJ.) which was delivered by

MITTER, J.—We are of opinion that in this case the judgment of the lower Appellate Court cannot stand.

The question between the parties was whether the plaintiff was entitled to have the alang or singha, marked B. C. in the Munsiff's map, removed, the plaintiff's allegation being that it was placed there in the month of August 1879 by the defendants, who are the proprietors of mouzah Rathni.

The plaintiff alleges that the land upon which the alang has been put up belongs to him, being part of a jagir of eight bighas within mouzah Titaria.

The defendants do not deny that the alang or singha B. C. is upon a piece of land appertaining to mouzah Titaria, but they allege that this piece of land does not appertain to the plaintiff's jagir of eight bighas, but to the khalisa land of mouzah Titaria; that it is really a part of an alang or singha of an ahar called ahar uparata, and that it has been in existence for more than twenty years.

The Munsiff came to the conclusion that the alang or singha B. C. was constructed upon land not belonging to the plaintiff's jagir, but to the khalisa land of mouzah Titaria, and that the alang or singha had been in existence for more than twenty years as a protection to the band of a portion of ahar uparata. He accordingly dismissed the plaintiff's suit.

It appears that the Munsiff visited the locality, and in his judgment he relies upon certain facts which he says came under his observation when he was on the spot. This local investigation was held by the Munsiff before the issues in the case were settled. Some of these facts, which are not proved by any evidence, but which came, according to the Munsiff's judgment, under his personal observation while he was on the spot, appear to us to have a material bearing upon the questions at issue between the parties.

The District Judge on appeal has reversed the decision of the Munsiff. He has come to the conclusion that the land upon which the disputed alang B. C. is situated appertains to the

plaintiff's jagir. He is also of opinion that the defendants have failed to prove that this alang or singha B. C. has been in existence for more than twenty years. He bases his decision mainly upon the oral evidence on the record.

As regards the result of the investigation held by the Munsiff, the District Judge seems to have excluded it entirely from his consideration. It is not very clear from his judgment whether he means to hold that, before the result of that investigation could be taken into consideration, it was necessary that the Munsiff should be examined as a witness in the case. However that may be, it is clear from his decision upon this point that he has entirely excluded the result of the Munsiff's investigation from his consideration. In his opinion it was not a material which he was legally competent to take into consideration in arriving at a conclusion in this case.

We are of opinion that his decision upon this point is not correct. There are many decisions of this Court in which results of investigations, made by the Judges personally, have been made the basis of judicial conclusions. In some of these cases it has been pointed out that it is the best material upon which a decision can rest. Looking at the language of s. 392 of the Code of Civil Procedure it is clear that the result of a local investigation, made by the presiding judicial officer, is a material which may be taken into consideration in arriving at a conclusion upon disputed questions of fact. Section 392 says: "In any suit or proceeding in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, and the same cannot be conveniently conducted by the Judge in person, the Court may issue a commission to such person as it thinks fit." It is clear from this that the delegation of the duty of elucidating any matters in dispute by local investigation is to be made only when the presiding Judge cannot conveniently conduct the enquiry himself.

The District Judge also appears to have been of opinion that the result of the enquiry, conducted by the Munsiff in this case, could not be considered by him because it was not evidence according to the definition of that word in the Evidence Act. He is perhaps right in this view. The definition of the word

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"evidence," as given in the Evidence Act, means and includes (1) all statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under enquiry: such statements are called oral evidence; (2) all documents produced for the inspection of the Court: such documents are called documentary evidence.

The result of a local enquiry by a presiding judicial officer does not come under either of these two heads; but the District Judge has not taken into consideration the definition of the word "proved" which comes immediately after. It is to this effect: "A fact is said to be proved when after considering the matters before it the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

It would appear, therefore, that the Legislature intentionally refrained from using the word "evidence" in this definition, but used instead the words, "matters before it." For instance, a fact may be orally admitted in Court. The admission would not come within the definition of the word evidence as given in this Act, but still it is a matter which the Court before whom the admission was made would have to take into consideration in order to determine whether the particular fact was proved or not.

But though we are of opinion that the District Judge was in error in not taking into consideration the result of the Munsiff's local investigation, we entirely agree with him in his remark that the Munsiff ought to have put upon paper the result of his investigation when it was completed. It is very desirable that judicial officers conducting local investigations should place upon record the results of their investigations as soon as they are completed, so that the parties may have an opportunity of seeing what the facts are which the judicial officers consider to be established by the local investigations.

But in this case we find that none of the facts upon which the Munsiff relied as coming under his personal observation while the local investigations were being conducted, are objected to in the petition of appeal filed by the defendants in the Court below as being incorrect. In referring to this circumstance we do not by

any means wish it to be understood that we consider that those facts which the Munsiff says came under his personal observation are to be taken as absolutely correct. All that we say is that the District Judge should not have excluded them from his consideration. Whether there are good grounds for accepting the result of the local investigation as correct, or rejecting it as incorrect, are matters with which we have nothing to do. It is for the District Judge to decide these questions.

For these reasons the rule will be made absolute; the order of this Court made under s. 551 of the Code of Civil Procedure will be set aside; and this appeal will be decreed, the decree of the lower Appellate Court being reversed; and the case remanded to that Court for re-trial.

The costs will abide the result.

Appeal allowed.

Before Mr. Justice Wilson and Mr. Justice Field.

KRISHNA GOBIND DHUR AND OTHERS (PLAINTIFFS) *v.* HARI CHURN DHUR AND OTHERS (DEFENDANTS)*

1882 *August* 18.

Landlord and Tenant—Suit for possession—Cause of action—Limitation—Act XV of 1877, *sch. II., cls.* 139, 144.

The plaintiff stated that in the year 1862 he purchased a talook in which some of the defendants then held an ijara for a term of years expiring in 1868. The talook had previously been a khas mehal in the possession of the Government, and was bought by the plaintiff at an auction sale held by the Collector. The plaintiff also stated that the ijaradar defendants, in collusion with the other defendants, had continued in possession of the lands held in ijara after the term of the ijara had expired, and had refused to give up possession thereof to the plaintiff. The Judge of the lower Appellate Court found that the defendants (other than the ijaradars) had been in possession previously to the sale in 1862, and he also found that there was no evidence to support the charge of collusion with the ijaradar defendants. He therefore dismissed the suit, (which was brought in 1880) on the ground of limitation.

Held, on second appeal, that the plaintiff's cause of action arose on the expiration of the ijara, and that the suit, whether governed by Articles

* Appeal from Appellate Decree No. 765 of 1881, against the decree of Baboo Ram Coomar Paul Chowdhry, Subordinate Judge of Sylhet, dated the 10th February 1881, reversing the decree of Baboo Upendro Chunder Ghose, Munsiff of Nabeegunge, dated the 24th September 1880.

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139 or 144 of the Limitation Act, Act XV of 1877, was not barred on the ground of limitation.

Woomesh Chunder Goopto v. *Raj Narain Roy* (1) cited.

THIS was a suit for the recovery of possession of land brought by some of the joint owners thereof. The other joint owners were made *pro formâ* defendants. The plaint stated that the plaintiffs and their co-sharers had bought the talook, in which the lands in question were situated, on the 4th of June 1862; the talook had been a *khas* mehal of Government, and they bought at an auction sale held by the Collector. Before the date of the auction sale certain relatives of the principal defendants became *ijaradars* of the lands in dispute for a term of years which expired with the year 1274, (11th April 1868.) The plaint stated that at the end of the term the *ijaradars* did not give up the lands, but allowed the principal defendants "to hold possession of the land along with them under an adverse right." The Munsiff found in favour of the plaintiffs, and decreed the claim.

On appeal, the Judge said: "The Munsiff has found that the case is not barred by limitation; but I hold that this finding is erroneous, because the Munsiff has considered the case as similar to one brought by a reversioner for setting aside a sale made by a Hindu widow, and he says that, as the term of the ijara ran up to the year 1274, the plaintiffs could not bring a suit before. But in my judgment the analogy drawn by the Munsiff does not apply. The reason is that the possession of a purchaser from a Hindu widow, or the possession of anybody with the consent of the widow, is not a possession adverse to the right of the reversioner. Had the plaintiffs in the present case proved their statement that the contending defendants held possession of the land in collusion with the ijaradars, then the analogy drawn by the Munsiff would have applied to this case; but on reference to the evidence adduced in this case, I do not find any proof to that effect. On the other hand it has been proved by the evidence of the witnesses examined by the defendants, as well as by the thakbust papers that, for a period of more than twenty years, the contending defendants and their predecessors were in possession of the land in question." The

(1) 10 W. R., 15.

Subordinate Judge then reversed the Munsiff's decree, and dismissed the suit with costs. The plaintiffs appealed to the High Court.

Baboo *Aukhil Chunder Sen* for the appellants.

The judgment of the Court (WILSON and FIELD, JJ.) was delivered by

WILSON, J.—We think that this appeal must be allowed. It appears to us that the lower Appellate Court has mistaken the application of the law of limitation to the case. The judgment of that Court says: The plaintiffs, therefore, are bound to prove that the ijaradars were in possession of the disputed land to the end of the term of their ijara, and if it comes out that the ijaradars did hold possession up to the end of the term of the ijara, then the cause of action of the plaintiffs may be held to have arisen just as the ijara terminated, otherwise the plaintiffs were bound to bring this suit within twelve years from the time at which the ijaradars were dispossessed from the land, or from the time at which their the (ijardars) predecessors had been dispossessd, in case the defendants were never in possession.

That appears to us to be a misapprehension of the law. The facts are very short. The land was purchased by the plaintiffs, and at the time when they acquired their title it was subject to an ijara to certain persons. During the currency of the ijara, the ijaradars were dispossessed. When did limitation begin to run against the plaintiffs? Did it run from the dispossession of the ijaradars, or from the termination of the ijara? It appears to us that it clearly runs from the determination of the ijara. Prior to that date they might possibly have a right to bring a suit for declaration of their title, and the Court would have power, probably in its discretion, to give them a declaratory decree; but they certainly had no power to sue for possession. Now by what rule in the Limitation Act is their right to sue governed? It may fall either under Article 140 of the second schedule, or under Article 144. It will be convenient first to refer to Article 139. That deals with a case where the suit is by a landlord to recover possession from a tenant, and there the time runs from the determination of the tenancy. That is the only section deal-

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ing expressly with the case of a landlord as such. The next article says that in a suit by *a remainder man*, a reversioner (other than a landlord) or a devisee, for possession of immovable property, the point from which time runs is, "when his estate falls into possession." Probably in this article, the expression "other than a landlord," means "other than a landlord as such suing his tenant." If that be so, then that article would apparently govern this case, and the time would run from the termination of the ijara. If the case does not fall within that article, then it must fall within Article 144, as being a suit "for possession of immovable property or any interest therein not hereby otherwise specifically provided for." Then the period of limitation begins to run from the time when the possession of the defendant becomes adverse to the plaintiff. "Plaintiff," by the interpretation clause, includes any person through whom the plaintiff claims; but the plaintiffs do not claim through the ijaradars. Therefore possession adverse to the ijaradars is not possession adverse to the present plaintiffs. This conclusion is entirely in accordance with the construction put upon our earlier Limitation Act, in the case to which we have been referred, *Woomesh Chunder Goopto* v. *Raj Narain Roy* (1). We think, therefore, that the decree of the lower Appellate Court should be reversed, and the decree of the Munsiff in plaintiff's favour affirmed.

The appellant will have his costs in this Court and in the lower Appellate Court.

Appeal allowed.

(1) 10 W. R., 15.

APPELLATE CRIMINAL.

Before Mr. Justice Field and Mr. Justice Norris.

MANU MIYA *v.* THE EMPRESS.*

1882
October 9.

Joinder of charges—Offences of the same kind committed in respect of different persons—Criminal Procedure Code, (Act X of 1872), *ss.* 452, 453, *and* 455.

Where an accused was charged under one charge including four counts, *viz.*—

(1). House breaking by night with intent to commit theft in the house of *A*;

(2). Theft from the same house;

(3). House breaking by night with a like intent in the house of *B*;

(4). Theft from that house;

And where he pleaded guilty to the first and third charges,

Held, that the case was within the terms of s. 453, and that the words "offences of the same kind" are not to be limited by the explanation to that section, but include a case like this, where a man has within a year committed two offences of house breaking.

Held, also, that the words "offences of the same kind" are not limited to offences against the same person.

Per FIELD, J.—The explanation to s. 453 must be understood as extending and not as limiting the meaning of that section.

Per NORRIS, J.—Care should be taken that accused persons are not prejudiced by charges being joined, and the Court should at all times be anxious to lend a willing ear to any application upon their behalf by separation of charges and for separate trials upon separate charges.

Empress v. *Murari* (1) dissented from.

THE facts of this case appear sufficiently from the judgment of Mr. Justice Norris.

No one appeared for either side.

The following judgments were delivered by the Court (FIELD and NORRIS, JJ.):—

NORRIS, J.—In this case there were four heads of charge or counts against the prisoner, *viz.*, *first*, house breaking by night

* Criminal Appeal No. 454 of 1882 against the order of H. Muspratt, Esq, Sessions Judge of Sylhet, dated the 21st June 1882.

(1) I. L. R., 4 All., 147.

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with intent to commit theft in the house of one Baroda Prosad Das; *second*, theft from the same house; *third*, house breaking by night with intent to commit theft in the house of one Tarini Churn Dutta; and, *fourth*, theft from the same house.

At the trial before the Sessions Judge the prisoner pleaded guilty to the first and third heads of charge, and was sentenced upon the first to three years rigorous imprisonment, and upon the third to three years rigorous imprisonment, to commence at the expiry of the sentence passed under the first head of charge.

It does not appear that any plea was recorded upon the second and fourth heads of charge; the Judge merely says: "No sentences are given under the second and fourth heads of charge as they are included in the first and third heads."

The Magistrate committed the prisoner upon one charge only, including therein the four heads of charge to which I have referred; and the Sessions Judge tried him upon that one charge as sent up by the Magistrate.

We do not think that the courses followed by the Magistrate and Sessions Judge are illegal. Section 452 of the Code of Criminal Procedure says: "There must be a separate charge for every distinct offence of which any person is accused, and every such charge must be tried separately, except in the cases hereinafter excepted." Section 453 says: "When a person is accused of more offences than one of the same kind, committed within one year of each other, he may be charged and tried at the same time for any number of them not exceeding three." Then follows the explanation: "Offences are said to be of the same kind under this section if they fall within the provisions of section four hundred and fifty-five." Section 455 says: "If a single act or set of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused person may be charged with having committed any such offence; and any number of such charges may be tried at once, or he may be charged in the alternative with having committed some one of the said offences."

Now if we are to hold that the words "offences of the same kind" in s. 453 refer to, and include only "offences that fall

within the provisions of s. 455," then undoubtedly there has been an illegality; there has been an "error or defect either in the charge or in the proceedings on the trial," which would call for our interference if we were of opinion that such error or defect had prejudiced the prisoner in his defence; but as the prisoner pleaded guilty, he cannot be said to have been thus prejudiced. But we are of opinion that we cannot so hold. To do so would be equivalent to striking s. 453 out of the Code altogether. We are of opinion that the words "offences of the same kind" in s. 453 are not to be limited by the explanation to that section, but include such a case as this where a man has within a year committed two offences of house breaking. The "offences" mentioned in s. 455 are not in fact "offences of the same kind," but offences of different kinds arising out of "a single act, or set of acts." Moreover, these offences of different kinds arising out of "a single act or set of acts" must, in the contemplation of the section, have been committed at one and the same time, whereas s. 453, by the use of the words "within one year of each other," clearly points to offences committed on distinct occasions, separated, it may be, by 364 days. Upon the words of the Act, therefore, we are of opinion that there has been no illegality.

We now proceed to consider another point, *viz.*, whether the "offences of the same kind," mentioned in s. 453, must be held to mean offences against one and the same person. We are of opinion that they must not be so limited. There is nothing in the words of the section itself so limiting them, and we are not at liberty to introduce words of limitation unless it is absolutely necessary to do so. We are aware that in this holding we are refusing to follow the decision of the High Court at Allahabad in the case of *Empress* v. *Murari* (1), but with the greatest respect for the learned Judges who decided that case, one of whom, Straight, J., has a most deservedly high reputation as a criminal lawyer, we do not think it is correct. As I said before there are no words in the section limiting its operation as the Allahabad High Court would limit it. This of itself would, in our opinion, be sufficient ground for supporting our present ruling: but

(1) I. L. R., 4 All., 147.

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we think it well to refer to the practice of the Criminal Courts in England as furnishing authority in support of our view. According to the Common Law of England, there is nothing to prevent a prisoner being charged on different counts of the same indictment on the several different felonies. In Hale's Pleas of the Crown, Vol. II, p. 173, it is laid down that "if there be one offender and several capital offences committed by him, they may be all contained in one indictment as burglary and larceny: larcenies committed of several things, though at several times, and from several persons, may be joined in one indictment"; and see *Reg.* v. *Heywood* (1). In the case of *Castro* v. *The Queen* (2) Lord Blackburn, at p. 243, makes the following observation: "The course taken with regard to one indictment was this: The Queen having sent her Commission to the Grand Jury or any other Commission to a proper tribunal, the tribunals so authorized presented all the offences that came to their knowledge; if it was brought sufficiently to their knowledge that a man had committed ten murders, fifty burglaries, and a score of larcenies, they would find, not one finding as to them all, but they would find in separate counts that he had committed each of those charged offences; and if there were many other persons (as generally there are) it would also be found that those other persons had committed the offences proved against them also, and of this presentment one record was made up. Upon that process could be issued against a man so charged, to bring him upon his trial before a petty jury, to try whether he was guilty of those offences so charged or not.

"Now, at Common Law, there was no objection whatever, in point of law, to bringing a man who was charged with several offences if those charges were all felonies, or were all misdemeanours, before one petty jury, and making him answer for the whole at one time. The challenges and the incidents of trial are not the same in felony and misdemeanour, and, therefore, felony and misdemeanour could not be tried together; but any number of felonies and any number of misdemeanours might. The con-

(1) 1 L and C, 451.
(2) L. R, 6 App. Ca., 229.

trary was asserted by the learned Counsel, but though repeatedly challenged to do so, he did not cite any authority in support of his contention. There was no legal objection to doing this; it was frequently not fair to do it, because it might embarrass a man in the trial if he was accused of several things at once, and frequently the mere fact of accusing him of several things was supposed to tend to increase the probability of his being found guilty, as it amounted to giving evidence of bad character against him. Whenever it would be unfair to a man to bring him to trial for several things at once, an application might be made, to the discretion of the presiding Judge, to say, 'try me only for one offence, or try me only for two offences; if one was the real thing, let me be tried for one, and one only;' and whenever it was right that that should be done, the Judge would permit it. For these mixed motives it was well established by a long series of decisions, (I confess I doubt whether they were right at first, but certainly they have been both well established now, and sanctioned by Statute—that is quite clear) that where the several charges were of the nature of felony, the joining of two felonies in one count was so, necessarily I may say, unfair to the prisoner that the Judge ought, upon an application being made to him, to put the prosecutor to his election, and send them to two trials. It never was decided, even in felony, that if that application for the election was not made, the joining of several felonies, that is to say, the taking several felonies which had been found together, and trying those several felonies before one petty jury, was wrong in point of law; on the contrary, it was repeatedly held that it was right enough, although, if the proper application had been made at the proper time in a case of felony, the party prosecuting would have been put to his election or made to take one felony only, and not both at the same time. But in cases of misdemeanour, it was by no means a matter of course that that should be done. I think that if the Judge, upon an application made to him, had been satisfied that to try the man for several misdemeanours together would work injustice to the prisoner, he had a perfect right to say 'I will not work this injustice by trying them together, let us diminish them in number, and try a reasonable number and no more.'

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I do not know whether that was ever done in a case of misdemeanour, but I feel very little doubt that it may have been."

The Legislature has enacted in two cases that three charges of felony may be charged in one indictment. 24 & 25 Victoria, cap. 96, enacts that "it shall be lawful to insert several counts in the same indictment against the same person for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person within the space of six months from the first to the last of such acts, and to proceed, thereon, for all or any of them;" and s. 71 of the same Act contains similar provisions with regard to three distinct acts of embezzlement.

Such is the law and practice in England with regard to felonies. In cases of misdemeanour there is no limit to the number of counts charging distinct offences that may be inserted in one indictment. In prosecution of what are called "long firm swindles" it is not unusual to insert ten or fifteen counts, each charging a separate offence against different persons. Within my own experience there was a case tried before Mr Justice Hawkins at the last May Sessions of the Central Criminal Court, where the indictment contained some 120 counts, and at least 25 or 30 of these charged separate offences against different persons. The offences in this case, house breaking by night, or as called in England burglary, were, according to English law, felonies; and, no doubt, had the prisoner been tried in England, two separate indictments would have been preferred against him; but here, happily, we know nothing of the antiquated distinction between felony and misdemeanour, and, therefore, if our view of the law is correct, the question in this case is reduced to one of practice, and upon this point we are of opinion that the practice prevailing in England with regard to misdemeanour, is the one that should be followed here. But the Judges should take care that prisoners are not prejudiced by that course being taken, and they should, at all times, be anxious to lend a willing ear to any application for separation of charges and for separate trials upon separate charges. The prisoner in this case having been convicted on his own plea, there is no appeal under s. 273

of the Criminal Procedure Code, except as to the extent or legality of the sentence as I have already pointed out. We are of opinion that there is no illegality, and having regard to the offences to which he pleaded guilty, we are of opinion that the sentences are not at all too severe.

This appeal will, therefore, be dismissed.

FIELD, J.—I am of the same opinion. I think that the explanation to s. 453 of the Code of Criminal Procedure must be understood as extending not as limiting the meaning of the section itself. As pointed out by my brother Norris, there are in the section no words which limit the three offences for which an accused person may be charged and tried at the same time to offences against the same person; and I think the explanation cannot operate to impose any such limitation or restriction upon the general language of the section.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice McDonell and Mr. Justice Field.

NOBIN CHUNDER ROY (ONE OF THE DEFENDANTS) *v.* RUP LALL DAS AND ANOTHER (PLAINTIFFS).*

1882.
July 11.

Contribution, Suit for—Government Revenue—Payment by one co-sharer for another.

Where a co-sharer of a portion of a talook is compelled to pay a quota of the Government revenue due on account of a share, not his own, in order to save the portion of the talook from being sold, he is entitled to a charge upon such share for the money so paid, and such share should be charged even when it has passed subsequently into the hands of a third party.

Enayet Hossain v. *Muddun Mones Shahoon* (1), followed.

IN this suit the plaintiffs sought to have it declared that a sum of money paid by them in respect of Government revenue for a seven-anna share in a certain talook should be declared a charge

* Appeal from Appellate Decree No. 441 of 1881 against the decree of Baboo Krishna Chunder Chatterjee, First Subordinate Judge of Backergunge, dated the 27th December 1880, modifying the decree of Baboo Doorga Churn Sen, Third Munsiff at Barisal, dated the 7th July 1880.

(1) 14 B. L. R., 155: S. C., 22 W. R., 411

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in the defendants' share in the talook, it having been paid on their account to prevent a sale taking place.

In the suit, as originally framed, there were seven defendants, and the first Court gave a decree as against only the first defendant, but on appeal this decree was varied and the amount decreed in favor of the plaintiffs was declared to be a charge on the 11 gundas 3¼ cowries share of the defendant No. 1, which had subsequently passed into the possession of defendant No. 4.

Defendant No. 4 now preferred a special appeal to the High Court.

The facts are, for the purposes of this report, sufficiently stated in the judgment of the Court.

Baboo *Jogesh Chunder Roy* and Baboo *Busunt Coomar Bose* for the appellant.

Baboo *Lal Mohun Das* for the respondents.

The judgment of the Court (McDONELL and FIELD, JJ.) was as follows:—

FIELD, J.—This is a case somewhat complicated by details, but the point which has to be decided is a very simple one when eliminated from these details. It appears beyond all doubt, and in fact it has now been admitted before us, that the plaintiffs and defendants 1, 2, 3, 4, 6, and 7 were joint proprietors of a seven-anna share in a talook, and for this seven-anna share a separate account had been opened, under the provisions of Act XI of 1859, in the Collectorate. By some mistake upon an arrear of revenue falling due, the whole talook was advertized for sale, but this mistake was afterwards corrected, and what was about to be sold for the unpaid balance of revenue was only the seven-anna share just mentioned. The plaintiffs, in order to prevent the sale, paid Rs. 87-6-10, which was the amount of the unpaid balance of revenue, and they have brought this suit to recover this amount from the defendants other than defendant 5, who are, as has already been pointed out, the plaintiff's co-sharers in the seven-anna share. The defendant No. 4 had before the transaction which has given rise to this case purchased a nine-anna share out of 5 annas 15 gundas treated as 16 annas,

that is, 5 annas 15 gundas out of the seven annas share. It has been found as a fact by the lower Courts that defendant No. 4 had paid his quota of revenue in respect of the nine-sixteenths of 5 annas 15 gundas so purchased by him, and of which he was the proprietor when the seven annas share fell into arrears. The present appeal is concerned with another share consisting of 11 gundas 3¼ cowries, that is, a share of the seven annas share. Now, in respect of this 11 gundas 3¼ cowries share the defendant No. 4 was a mortgagee under a mortgage granted by defendant No. 1, and after the payment by the plaintiffs of the balance of revenue, the defendant No. 4 became the purchaser at an execution sale of this 11 gundas 3¼ cowries share. The Judge in the Court below, applying the principle laid down in the case of *Enayet Hossain* v. *Muddun Monee Shahoon* (1) has directed that the revenue paid by the plaintiffs be a charge upon this 11 gundas 3¼ cowries share. It is now contended before us that the principle of that case ought not to be applied to the present case, because in that case the whole estate was about to be sold, and in the case before us it was merely a share, *i.e.*, the seven annas share which was about to be sold. It appears to us that this really makes no difference. The principle on which that case proceeded was, that inasmuch as by the payment of the Government revenue the estate was saved and protected from sale, the person who afterwards became the owner of the estate, and was benefited by this protection, could not justly say that the money paid to effect that protection ought not to be a charge on the thing protected, and we think that that principle is just as applicable to a share of an estate as it is to the whole of an estate. An argument has been raised upon s. 54 of the Sale Act, but we do not see that *that* has any application to the case now before us. The defendant No. 4 having purchased has become the assignee by law of defendant No. 1, and inasmuch as the amount of revenue paid to protect the seven annas share from sale would justly be made a charge upon the 11 gundas 3¼ cowries share in the hands of defendant No. 1, it is equitable that it should be a charge upon the same share in the hands of the

(1) 14 B. L. R., 156: S. C. 22 W. R., 411.

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assignee by law of the same defendant No. 1. We think, therefore, there are no grounds for this appeal, which will be dismissed with costs. We may observe that no question has been raised by either party as to there not being a personal decree against defendant No. 1, and the amount being leviable upon the share only in case it cannot be levied from him personally. This judgment will admittedly govern appeals Nos. 466 and 467 of 1881.

MCDONELL, J.—I am unable to distinguish this case from that of *Enayet Hossain* v. *Muddun Monee Shahoon* (1), and following that ruling I concur in dismissing these appeals.

Appeal dismissed.

Before Mr. Justice Wilson and Mr. Justice O'Kinealy.

1882. *July* 10.

BHOLANATH ROY (JUDGMENT-DEBTOR) *v.* NURENDRO NATH ROY (DECREE-HOLDER).*

Landlord and Tenant—Rent Decree—Execution of Decree—Limitation—Beng. Act VIII of 1869, *s.* 58.

Where an application for the transfer of a rent decree for execution has been made and granted by the Court which passed the decree within three years from the date of the decree, but no application for execution is made to the Court to which the decree has been transferred within three years from the date of the decree, the execution of the decree will be barred by limitation, under the provisions of Beng. Act VIII of 1869, s. 58.

THIS was an application for execution of a decree for rent. The facts are thus stated by the Court of first instance: "The decree in question is a rent decree, and for a sum less than Rs. 500, and the application under s. 230 of Act X of 1877 has been made to this Court, after expiration of three years from the date of the decree; but the application under s. 223 of the said Act for the transfer of the decree was made to the Munsiff's Court, Putnitollah, in which these decrees were passed within three years from the date of the decree. The judgment-debtor objects to the execution on the

* Appeal from Appellate Order No. 94 of 1882, against the order of C. A. Kelly, Esq., Judge of Pubna, dated the 20th January 1882, reversing the order of Baboo Lokenath Nundi, Munsiff of Nawabgunge, dated the 13th September 1881.

(1) 14 B. L. R., 155: S. C., 22 W. R., 411.

plea that limitation bars. The point to be decided is whether the execution of the decree is barred by limitation." The Munsiff, while holding in conformity with *Heera Lall Seal* v. *Poran Matteah* (1), and *Rhidoy Krishna Ghose* v. *Kailas Chandra Bose* (2), that s. 58 was not to be construed literally, yet held that an application under s. 223 of Act X of 1877 could not be considered an application to execute the decree; and as the application under s. 230 for execution of the decree had not been made within three years from the date of the decree, he held the execution of the decree was barred by limitation. On appeal the Judge said:

"In this case I think the Munsiff's judgment may be set aside. There is nothing in s. 230, Act X of 1877, that prohibits the presentation of an application for execution to the Court which passed the decree, although another application is put in afterwards before the Court to which the decree has been sent for execution. In this case it appears that an application was put in for transfer before the Munsiff of Putnitollah within time; that the decree was sent for execution to the Munsiff of Nawabgunge in this district, reaching the Munsiffee, it appears, on or about the 5th of May 1881; and that application for execution, with talubanah for notice, was put in on the 10th of May 1881, the Munsiff having directed by order of the 5th of May that a notice should be put up at the cutcherry for the decree-holder to appear, and directing that the case be put up on the 1st of June. It appears that notice subsequently issued, and that objection was made by the judgment-debtor. It is stated by the pleaders for the decree-holder that the application, which they contend was an application for execution, was in tabular form, though I do not consider it proper that any document showing this should be admitted on the record at this time. It appears, however, that the prayer in this application may be considered as an application for execution so far as allowing execution to proceed goes. On this view I reverse the order of the Munsiff and decree the appeal with costs."

The judgment-debtor appealed to the High Court on the grounds that the Court of appeal was wrong—(1) in holding execution was not barred by s. 58, Beng. Act VIII of 1869; and (2) in holding that an application under s. 223 for transfer of a decree to another Court is an application for execution within the meaning of s. 230 of the Code of Civil Procedure; and that the said application under s. 223 saved the application for execution from being barred.

(1) 6 W. R. (Act X), 84. (2) 4 B. L. R., F. B., 92: S. C., 13 W. R. (F. B.), 3.

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BHOLANATH ROY v. NURENDRO NATH ROY.

Baboo *Bama Churn Banerjee* for the appellant.

Baboo *Joy Gobind Shome* for the respondent.

The judgment of the Court (WILSON and O'KINEALY, JJ.) was delivered by

WILSON, J.—In this case the question turns wholly upon the construction of s. 58 of the Rent Act, which says that "no process of execution of any description whatsoever shall be issued on a judgment in any suit for any of the causes of action mentioned in ss. 27, 28, 29 or 30 of this Act, after the lapse of three years from the date of such judgment, unless the judgment be for a sum exceeding five hundred rupees." In the present case the judgment or decree is for a sum less than Rs. 500, and the question raised is whether the right to execute is barred.

Now what appears to have happened is this: that within three years from the date of the decree an application was made for the transfer of a certified copy of the decree from the Court by which the decree was made, to the Court of the Munsiff of Nawabgunge. A certified copy was transmitted. After the lapse of three years from the date of the decree, an application was made for execution to the Munsiff of Nawabgunge. He held that the application was made too late. The District Judge reversed that decision. We think that the Munsiff was right, and the District Judge wrong. There are several decisions modifying the severity of the result of the absolutely literal construction of the terms of s. 58, as that section says that "no process of execution of any description whatsoever shall be issued." Acting upon the ordinary rule of construction that the delay on the part of the Court is not to prejudice any man's rights, that section has been construed to mean that no process of execution shall issue unless it is properly applied for within three years. We have no right to relax the meaning of that section any further. We are asked to put such a construction upon it as to make it mean that no process shall issue unless some step, with a view to making an application, has been taken within three years. We do not think we are at liberty to put any such construction. The appeal will be allowed with costs.

Appeal allowed.

Before Mr. Justice Wilson and Mr. Justice Field.

BHUGWAN CHUNDER ROY CHOWDRI AND OTHERS (PLAINTIFFS), *v.* MANICK BIBEE (DEFENDANT).*

1882 *August* 23.

Act X of 1859, s. 23—Revenue Court, Jurisdiction of—Surety for payment of rent—Binding Decree.

In a suit for arrears of rent in a Revenue Court under Act X of 1859, the lessors joined as defendants the lessee, and another person whom they alleged to be a surety for the payment of the rent. An *ex parte* decree was made in favour of the plaintiffs, but it did not expressly make the alleged surety liable for the money awarded. In execution of the decree certain of the alleged surety's land was sold, and the decree-holders were the purchasers at the sale.

An application under Beng. Act VII of 1876 for the registration of their names as proprietors of the land purchased having been rejected, the decree-holders brought the present suit to establish their title to, and to recover possession of, the land.

Held, that the plaintiff's title was bad on the ground that the decree did not purport to bind the surety for the payment of the money awarded, and on the ground that a Revenue Court is not competent to entertain a suit against a person who has become surety for payment of rent.

THE plaintiffs, alleging that they had been in possession of the land in dispute previous to an order dated the 30th June 1879 of the Collector in a proceeding under Beng. Act VII of 1876, rejecting their application to be registered as proprietors, instituted this suit on the 26th June 1880 to establish their title to, and to recover possession of, the land. The facts material to this report appear from the judgment of the High Court.

The suit having been dismissed by the lower Court, the plaintiffs appealed.

Baboo *Kally Mohun Doss*, and Baboo *Sharoda Churn Mitter* for the appellants.

Baboo *Hurry Mohun Chuckerbutty* for the respondent.

The judgment of the Court (WILSON and FIELD, JJ.), was delivered by

WILSON, J.—We think that this appeal should be dismissed.

* Appeal from Original Decree No. 223 of 1881, against the decree of Baboo Uma Churn Kastogiri, Subordinate Judge of Tipperah, dated the 26th of June 1881.

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BHUGWAN CHUNDER ROY CHOWDRI v. MANICK BIBEE.

The suit is one to recover certain land, and the case made is this: That the plaintiffs, or rather those from whom the plaintiffs claim, granted an ijara in December 1867 to the son-in-law of the present defendant, one Fuzur Ali; that Fuzur Ali executed a kabuliat in accordance with the ijara; that the present defendant executed at the same time through her mookhtar a bond for the purpose of securing payment of rent; that subsequently in a suit brought in the year 1868, in the Court of the Deputy Collector of Moonsheegunge in the district of Dacca, under Act X of 1859, against both Fuzur Ali and the defendant to recover arrears of rent, a decree was recovered; that after the Act had ceased to be law, and after Act III of 1870 had been passed, the decree (which would seem to have been transferred in accordance with the last mentioned Act by the Deputy Collector to the Subordinate Judge's Court at Dacca) was remitted for execution from the Court of the Subordinate Judge at Dacca to the Court of Tipperah, and that there in execution of the decree, the right, title, and interest of the present defendant in the land sued for was sold and purchased by the plaintiffs. This is the title on which they now sue.

It is obvious that, this title being founded upon a decree followed by execution, it must be shown, in order to make out a good title, *first*, that the decree was one purporting to bind the present defendant for the payment of money; *secondly*, that it was a decree made by a Court of competent jurisdiction.

The decree was made in a suit in which the son-in-law and the present defendant were both made defendants. The son-in-law, Fuzur Ali, is described as the principal defendant, and the other as merely a *pro formâ* defendant. The decree states, first, that the claim is for recovery of arrears of rent under Act X of 1859; it then goes on to recite the ijara, and it says:

"The defendant No. 1, on the strength of a deed of security executed by defendant No. 2, took a Tahoot settlement of jowar" so and so, which it describes in detail, and then it says: "The present suit was instituted on the 31st August 1869 for recovery

of the balance Rs. 1,213-1-10-3, inclusive of interest, from the defendant," the word used being not in the plural.

"According to the reasons given in the judgment passed to-day in English" (which judgment was not put in evidence) "it is ordered that a decree be passed in favor of the plaintiffs together with costs, fee, and interest."

That decree throughout points out that one defendant is the principal debtor, and the other is a surety. It speaks of the money as due by the one, and it says that a decree is given without saying against whom. It says nothing about the principal debtor being, or possibly hereafter becoming, unable to pay the money decreed against him. It contains no such provision as the law directs in case of decrees against principal and surety requiring the money awarded to be levied from the principal in the first instance, and it does not anywhere expressly say that any amount of money is awarded against the surety.

It is quite consistent with the terms of the decree that the surety may have been made a party to it only to have a decision binding upon her as to the indebtedness of the principal debtor in case of subsequent proceedings against the surety. It is for the plaintiff to make out his title, and show clearly that the decree is a decree for money against the present defendant, and he has failed to do so. All the subsequent proceedings must, therefore, fall to the ground.

On the second question it appears to us also that the title of the plaintiff fails, That is the question of jurisdiction.

The decree relied upon was a decree given by the Deputy Collector, and it could be given by that officer only under s. 23, Act X of 1859. Now, that is an Act which, according to its preamble was intended to re-enact, with certain modifications, the provisions of the existing law relative to the rights of ryots with respect to the delivery of pottahs and the occupancy of land, to the prevention of illegal exaction and extortion in connection with demands of rent, and to other questions connected with the same, to extend the jurisdiction of Collectors, and to prescribe rules for the trial of such questions, as well as of suits for the recovery of arrears of rent, and of suits arising out of the distraint of property for such arrears, and to amend the law relating

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to distraint. That is to say, the preamble describes the law as a law relating to matters which arise between landlord and tenant as such. Then s. 23 describes what suits are to be brought in the Collector's Court. The 4th clause says: "All suits for arrears of rent due on account of land, either kheraj or lakhiraj, or on account of any rights of pasturage, forest rights, fisheries, or the like."

The Act does in some parts deal with rights of persons different from landlord and tenant, and where it does, it does so expressly. The very next section, (s. 24) in dealing with suits by zemindars against their collecting agents, expressly allows the sureties of such agents to be brought into such suit. Now taking the Act by itself, it appears to us to be free from reasonable doubt that sub-section 4 of s. 23 applies only to suits for rent by a landlord against his tenant as such, and not to suits against sureties or other persons not tenants. The authorities are very strong to the same effect. The most important of these is the Full Bench case, *Prosonno Coomar Paul Chowdry* v. *Koylash Chunder Paul Chowdry* (1). That case appears to us to be a clear and unqualified decision to the effect that the jurisdiction of the Revenue Courts under the sub-section in question was limited to cases between landlord and tenant as such, and did not extend to claims against any person other than a tenant. That has been followed in a series of cases; for instance, in *Kishen Buttee Misrain* v. *Hickey* (2), and in *Ram Tanu Acharji* v. *Komal Lochan Roy* (3). In a more recent case, *Bipinbehari Chowdry* v. *Ramchandra Roy* (4) there was some difference of opinion between the learned Judges before whom the case came as to the precise bearing of the rule of law upon the particular case before them, but all agreed that the only questions that the Revenue Courts could try were those between landlord and tenant as such. It is true that there are cases in which the jurisdiction has been upheld where the person sued has not been the person in whose name

(1) B. L. R. Sup. Vol., 759: S. C., 8 W. R., 426.

(2) 11 W. R., 406.

(3) 3 B. L. R., Ap. 37: S. C., 11 W. R., 407.

(4) 5 B. L. R., 234.

the holding was taken, because the doctrine of benami has been recognized, and a suit might lie against the real tenant who had taken his holding in the name of a benamidar. An example of this will be found in *Heeraloll Bukshee* v. *Rajkishore Mozcomdar* (1).

Two cases, however, were relied upon on the other side. Those are *Bhoobun Mohun* v. *Bhubo Soondiree Debia Chowdrain* (2), and an earlier case, *Koomeroonissa Begum* v. *Khyroonissa Begum* (3). These are said to be authorities for holding that a surety might be sued in a Revenue Court together with the principal for whom he had become surety.

The earlier of those cases appears to us to be by no means an authority for that proposition. The plaintiff in that case appears to have alleged the so-called surety to have been the actual tenant, and in actual occupation of the demised premises, and, therefore, liable to pay the rent. The defence set up suretyship. The facts brought before the Court do not appear from the report, and we are left wholly in the dark as to what the materials upon which the Court acted really were. All that we know is, that the Court sent the case back to be re-tried.

Then in *Bhoobun Mohun* v. *Soonduree Debia Chowdrain* (2) the decision taken by itself does appear to be inconsistent with the series of cases to which we have referred. But there again there is no report of the facts of the case, or of the arguments, and nothing to enable us to say what kind of case the Court was really dealing with. When we observe that this case was decided within a few months after the Full Bench decision in *Prosunno Coomar Paul Chowdry* v. *Koylash Chunder Paul Chowdry* (4), and that one of the learned Judges, before whom the case came, was himself a member of the Full Bench, it is impossible to suppose that the Court can have intended to decide something in apparent conflict with the decision of the Full Bench without stating its reasons for holding it not to be in conflict. We are bound, therefore, to assume that

(1) W. R., Sp. No., 58.
(2) 8 W. R., 452.
(3) S. D. A. Jan. to June 1862, p. 297.
(4) B. L. R. Sup. Vol., 759: S. C., 8 W. R., 428.

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there must have been facts in that case of such a nature as to put the matter on a different footing from the other cases.

These considerations are sufficient to dispose of the present case, and the appeal will, therefore, be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Tottenham and Mr. Justice Bose.

1882 *July* 31.

BALLY DOBEY (PLAINTIFF) *v.* GANEI DEO AND ANOTHER (DEFENDANTS).*

Execution of decree—Attachment—Shikmi Ghatwali Tenure.

A shikmi ghatwali tenure, held under the superior ghatwal, is not liable to be sold in execution, nor are its proceeds liable to attachment for satisfaction of the debt due from its holder.

Mr. *Evans*, Baboo *Mohesh Chunder Chowdhry* and Baboo *Mohini Mohun Roy* for the appellant.

Mr. *Branson*, Baboo *Sree Nath Dass*, Baboo *Doorga Mohun Dass*, and Baboo *Kuroona Sindhu Mookerjee* for the respondents.

The facts of this case sufficiently appear from the judgment of the Court (TOTTENHAM and BOSE, JJ.) which was delivered by

TOTTENHAM, J.—We are of opinion that the lower Courts' judgment is correct. The question involved in the suit is whether a shikmi ghatwali tenure, held under the superior ghatwal, is liable to be sold in execution, or its proceeds liable to attachment for satisfaction of the debt due from its holder. The lower Court has held that it is not liable for such debts, and we entirely concur in that opinion. The shikmi tenure partakes of the nature of the superior ghatwali tenure, and as the latter has been repeatedly held by this Court to be not liable for such debts, the former will be necessarily so. The inferior tenure cannot have larger incidents attached to it than the superior.

We accordingly dismiss the appeal with costs.

Appeal dismissed.

* Appeal from Appellate Decree No. 2457 of 1880 against the decree of of W. Oldham, Esq., Deputy Commissioner of Damka, dated the 29th September 1880, modifying the decree of C. W. Wilmot, Esq., Sub-Judge of Deoghur, dated 12th May 1880.

Before Mr. Justice Mitter and Mr. Justice Norris

SHEO PROSHAD AND ANOTHER (DEFENDANTS) *v* JUNG BAHADOOR AND ANOTHER (PLAINTIFFS).*

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August 4.

Hindu Law—Mitakshara—Alienation by father—Joint family—Sale in execution of money decree against father of Mitakshara family.

The mere fact of a decree being passed against the father only of a joint family governed by the Mitakshara law will not lead necessarily to the conclusion that what was sold in execution of that decree is only the father's interest in the joint family property. Notwithstanding the decree being against the father only under certain circumstances, there may be a valid sale of a joint property belonging to the family in execution thereof.

In execution of two money decrees against *A* alone, the right, title and interest of *A* in certain joint family property was sold, and the entire share of the joint family was taken possession of by the auction purchasers.

In a suit by the minor son and the wife of *A*, who with *A* constituted a joint family governed by the Mitakshara law to recover possession of their shares in the property sold, *Held* that, although the plaintiffs were not parties to the decrees, in execution of which the sales took place, the mere fact of *A* being sued alone was not sufficient to justify the finding that only his right, title and interest passed under the sales; and that as the facts of the case showed that the decrees were passed with reference to transactions which clearly concerned the joint family, the whole of the share of the joint family in the properties sold passed to the auction purchaser, the plaintiffs having failed to show that the debts, which were the foundation of the decrees in execution of which the sales were held, were contracted for immoral purposes.

Umbica Prosad Tewary v. *Ram Sahay Lall* (1), and *Ponnappa Pillai* v. *Pappudayyangar* (2), followed

Ramphul Singh v. *Deg Narain Singh* (3), dissented from.

THIS was a suit in which the plaintiffs, who were the minor son and wife of one Kali Sahai, sought to recover possession of a two-third share out of seven annas in certain mouzahs which had formerly belonged to Kali Sahai, but had been taken possession of by the plaintiffs, who alleged that they had purchased them at sales in execution of two decrees against Kali Sahai.

* Appeal from Original Decree No. 97 of 1881 against the decree of Baboo Mohendro Nath Bose, First Subordinate Judge of Tirhoot, dated the 28th March 1881.

(1) I. L. R., 8 Calc., 898. (2) I. L. R., 4 Mad., 1.
(3) I. L. R., 6 Calc., 517.

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The plaintiffs claimed to be entitled as members of a joint family, and alleged that one of the mouzahs in question, *viz.*, Dowlatabad, had not been sold. The lower Court was of opinion that Dowlatabad had not passed under the sales, and with regard to the other mouzahs, held that the case was governed by the ruling in the case of *Deendyal Lal* v. *Jugdeep Narain Singh* (1), and that consequently the defendants who contested the claim had only purchased the right, title and interest of Kali Sahai in the properties, and that the plaintiffs were entitled to a decree for possession of the share claimed.

The facts of the case are sufficiently stated in the judgment of the High Court, to which Cou t the defendants appealed against that decree.

Mr. *Branson* and Baboo *Pran Nath Pundit* for the appellants.

Mr. *R. E. Twidale* for the respondents.

The judgment of the Court (MITTER and MORRIS, JJ.) was delivered by

MITTER J.—The following genealogical table of the family will be of help in stating the facts of this case :—

Buniad.
|
Muni Lall.

Protab Narain.
|
Kali Sahai,
Defendant, third party.
Mt Rohini Kooer.
Plaintiff No. 2.
|
Jung Bahadoor,
(Minor) Plaintiff No. 1.

From the above tree it will appear that the plaintiffs are the minor son and wife of Kali Sahai, who has been made a *pro formâ* defendant. The appellants before us were the defendants who defended the suit in the lower Court. At the time of the institution of the suit, they were in possession of seven annas of Jufferabad *asli*, Aurungabad, Jehanabad, and Dowlatabad, *dakilis*, of which plaintiffs claim to recover possession of a 4 annas 8 pie share.

It appears that these mouzahs constitute an estate, the towji

(1) I. L R , 3 Calc., 198

number of which is 1,300, and the Government revenue of which is Rs. 27-13-11. Eight annas of these mouzahs were held and owned by Kali Sahai, who, on the 28th February 1873, sold a one-anna share in each of these mouzahs to a third party. On the 15th September 1874, in execution of two decrees against Kali Sahai, it is alleged by the plaintiffs that the first three mouzahs were sold, but that the auction purchasers under their purchase took possession of the whole seven-annas share of these mouzahs, including Dowlatabad, on the 12th Bysack 1282 (April 24th, 1875). The plaintiffs' case is that under these auction sales only the interest of Kali Sahai in the first three mouzahs passed; therefore they claim to recover possession of two-thirds of seven annas of these mouzahs, *i.e.*, a 4 annas 8 pie share on partition thereof, between Kali Sahai on the one hand and the plaintiffs on the other.

It will be convenient here to state the transactions which led up to the auction sales mentioned above. Muni Lall and Pertab Narain, father of Kali Sahai, borrowed from one Khajeh Mohamed Rs. 1,200, and executed a bond in favour of the creditor on the 30th June 1858, hypothecating certain properties other than those in suit. This bond was renewed on the 28th April 1862 by Muni Lall, who executed it for himself, and as guardian of Kali Sahai, who was then a minor, his father Pertab Narain having died in the meantime. There was a second renewal of this debt by Muni Lall for self and as guardian of Kali Sahai on the 29th January 1866. Khajeh Mohamed, after the death of Muni Lall, brought a suit against his widow, Deoti Kooer and Kali Sahai, for the recovery of the money due under the last mentioned bond. On the 18th August 1870 he obtained a decree. It appears that on the 15th February 1872, Kali Sahai borrowed from Jugger Nath Singh and Janki Sahai Rs. 5,000, to pay off the debt due from him to the decree-holder Khajeh Mohamed. The creditors, on the 8th February 1873, obtained a decree against Kali Sahai for the money due under this bond. Certain properties, other than those in dispute, having been hypothecated in the bond executed in favor of Jugger Nath Singh and Janki Sahai, the decree of the 8th February 1873 declared that the money decreed should continue to be a charge upon the

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properties hypothecated. In execution of this decree, the right, title, and interest of Kali Sahai in mouzah Jufferabad, towji No. 1,300, and bearing a sudder jumma of Rs. 27-13-11, were brought to sale on the 15th September 1874, and purchased by Peary Lall and Girdharee Mahto for Rs. 4,300. The appellants before us are purchasers from Peary Lall and Girdharee.

On the same 15th September 1874, in execution of another decree, dated the 18th April 1874, against Kali Sahai, his right, title, and interest in seven annas of mouzahs Aurungabad and Jehanabad, were sold and purchased by the same auction-purchasers. Aurungabad was purchased for Rs. 775, and Jehanabad for Rs. 1,750. The history of this decree is as follows: After the death of Muni Lall there was a dispute between Kali Sahai and Deoti Kooer his widow, regarding Muni Lall's property. Kali Sahai claimed the whole of it on the ground that the family was joint. The dispute between these parties was settled by a compromise filed by them in a regular appeal pending in this Court between them in 1870. By this compromise, Muni Lall's properties were divided between Kali Sahai and Mussamut Deoti Kooer in certain proportions, Kali Sahai having taken over all the debts due from the estate of Muni Lall. One Ram Dhoni Sahai was a creditor of this estate, and it was for Ram Dhoni's debt that the decree of the 18th April 1874 was passed against Kali Sahai. It has been already stated that in execution of this decree Kali Sahai's right, title and interest in seven annas of mouzahs Aurungabad and Jehanabad were brought to sale on the 15th September 1874, and purchased by Peary Lal and Girdharee Mahto. The appellants before us are the purchasers from these auction-purchasers in this instance also. They contend that in execution of the first-mentioned decree, the whole seven annas share of the estate No. 1,300, including all the *dakhili* mouzahs, was sold, and that the auction-purchasers took possession under their purchase in April 1875 of the whole seven annas share of the estate.

The lower Court held that in the first auction sale only mouzah Jufferabad was sold, and the *dakhili* mouzahs Aurungabad and Jehanabad were sold in execution of the other decree. Mouzah Dowlatabad was not sold at all. Then as regards the interest that was sold, it was of opinion that, as the plaintiffs

were not parties to the decrees, the interest of the father alone in these properties was sold.

We agree with the lower Court that Dowlatabad was not sold. If under the first auction purchase the purchasers had acquired a seven annas share of the whole estate, they would not have bid for the *dakhili* mouzahs of Aurungabad and Jehanabad which were brought to sale on the same date. It was said in the course of the argument before us that the purchasers in the first sale bid for the *dakhili* mouzahs in the second sale, because they wanted to avoid litigation, which might have ensued if they had allowed third parties to purchase the *dakhili* mouzahs. But it appears to us that, if they had really purchased in the first auction sale all the *dakhili* mouzahs, they would have *at least made an attempt* to prevent a second sale of two of them. On this point we agree with the lower Court in the conclusion to which it has come.

With reference to the question as to what was sold, we are of opinion that the decision of the lower Court is not correct. That Court was of opinion that, because the plaintiffs were not parties to the decrees, in execution of which the sales in question took place, therefore, according to the principle laid down by the Judicial Committee of the Privy Council in *Deendyal Lall* v. *Jugdeep Narain Sing* (1), only the interest of the father passed. It has been shown that the circumstance of the father being sued alone will not necessarily bring the case within the ruling in *Deendyal Lal* v. *Jugdeep Narain Sing*. See *Umbica Prosad Tewary* v. *Ram Sahay Lall* (2). The same view was taken by a Full Bench of the Madras High Court in the case of *Ponappa Pillai* v. *Pappuvayyangar* (3).

In a recent case decided by their Lordships of the Judicial Committee of the Privy Council (*Muttayan Chetti* v. *Sangili Vira Pandia Chinnatambiar* (4), in which the judgment was delivered on the 10th May last), the Full Bench decision of the Madras High Court has been approved as laying down the law correctly. A contrary view seems to have been taken by a Division Bench of

(1) I. L. R., 3 Calc., 198.
(2) I. L. R., 8 Calc., 898.
(3) I. L. R., 4 Mad., 1.
(4) I. L. R., 6 Mad., 1.

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this Court (PRINSEP and FIELD, JJ.) in *Ramphul Singh* v. *Deg Narain Singh* (1). This decision is dated the 1st August 1881, but Mr Justice Prinsep in another case, the judgment of which has not yet been reported, took the same view as was taken in *Umbica Prosad Tewary's case*. This judgment was delivered on the 16th June last. Under these circumstances, and specially as the Madras Full Bench decision has been approved by the latest judgment of the Judicial Committee of the Privy Council on this point, we do not think that we are bound to refer this question to a Full Bench on the ground of there being a conflict in the decisions of this Court. The preponderance of authorities, therefore, is in favour of the proposition that the mere fact of a decree being passed against the father only will not lead necessarily to the conclusion that what was sold in execution of that decree is only the father's interest in a joint family property. Notwithstanding the decree being against the father only, under certain circumstances there may be a valid sale of a joint property belonging to the father and the son in execution thereof.

What we have to determine in this case is whether the whole seven annas share belonging to Kali Sahai and his son was sold or only the father's interest. If the former, can the sale stand?

Although the plaintiff No. 1 was not of age at the time of the sales, yet it is quite clear upon the evidence that both his father and mother, who are interested in protecting his interest, were under the belief that the whole seven annas share was sold. The auction-purchasers were allowed without any opposition or protest on their part to take possession of the whole seven annas share. The decree in execution of which the first sale took place, was passed with reference to a transaction which clearly concerned the joint family. The bond, which was the basis of that decree, was the final outcome of a loan which had been originally contracted by Pertab Narain, Kali Sahai's father. Having regard to these circumstances, we are of opinion that the whole seven annas share in Mouzahs Jufferabad, Aurungabad and Jehanabad passed by the auction sales.

The next question is whether these sales are binding upon the

(1) I. L. R., 8 Calc., 517.

minor son, Jung Bahadoor. According to the principle laid down in *Suraj Bunsi Koer* v. *Sheo Prosad Singh* (1), the plaintiffs can set aside the sales if they can prove that the debts, which were the foundations of the decrees in execution of which they were held, were contracted by the father for immoral purposes. This the plaintiffs in this case have failed to prove. Their suit, therefore, as regards Jufferabad, Aurungabad and Johanabad, will fail. We, therefore, modify the decree of the lower Court to this extent, *viz.*, that we dismiss the plaintiff's suit as regards these mouzahs, but we affirm the decree so far as the Mouzah Dowlatabad is concerned. As the major portion of the plaintiff's claim has failed, they must pay the defendant's costs in both Courts.

Appeal allowed and decree modified.

Before Mr. Justice Wilson and Mr. Justice Field.

RAMJOY SURMA (DEFENDANT) *v.* JOY NATH SURMA (PLAINTIFF).*

1882 *July* 27.

Contribution, Suit for—Money paid in satisfaction of joint decree—Small Cause Court, Jurisdiction of.

A suit for contribution for money paid by one judgment-debtor in satisfaction of a joint decree against him and others cannot be entertained by a Court of Small Causes.

Rambux Chittanjee v. *Mudhoosoodun Paul Chowdhry* (2); *Shaboo Majee* v. *Noorai Mollah* (3) followed; *Nathprasad* v. *Baijnath* (4), dissented from.

IN this case the plaintiff alleged that he and the defendant jointly had borrowed a sum of money from one Ram Kanai Das, who, on the 9th of September 1876, obtained a joint decree for the amount, with costs, against the plaintiff and the defendant. In 1877, the decree-holder took out execution against the plaintiff alone, and recovered from him Rs. 250. The decree-holder applied

* Appeal from Appellate Decree No. 1993 of 1880 against the decree of Baboo Ram Coomar Paul, Subordinate Judge of Sylhet, dated the 10th July 1880, modifying the decree of Baboo Upendro Chunder Ghose, Munsiff of Nubeeganje, dated the 31st March 1880.

(1) L. R., 6 I. A., 88: S. C., I. L. R., 5 Calc., 148.
(2) B. L. R. Sup. Vol., 675; 7 W. R., 377.
(3) B. L. R., Sup. Vol., 691.
(4) I. L. R., 3 All., 66.

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for further execution, but while his application was pending he came to a compromise and sold the decree to the plaintiff for Rs. 90. The plaintiff claimed to recover in the present suit Rs. 170 from the defendant, being half of the total amount paid by him under the decree of the 9th of September 1876. The suit was dismissed by the Court of first instance, but this decision was reversed on appeal. The defendant appealed to the High Court.

Baboo *Joy Gobind Shome* for the appellant.

Baboo *Juggut Chunder Banerjee*, for the respondent, objected that no second appeal lay, as the suit being one for contribution and the amount claimed being under Rs. 500, it was of a nature cognizable in a Court of Small Causes.

The judgment of the Court (WILSON and FIELD, JJ.) was delivered by

WILSON, J.—This is a second appeal from a decision of the Subordinate Judge of Sylhet modifying a decree of the Munsiff of Nubeegunge. A preliminary objection was raised that under s. 586 of the Procedure Code this appeal does not lie, on the ground that the claim is under Rs. 500, and the cause of action of such a nature that a Small Cause Court had jurisdiction over it.

The claim is for contribution. The case found is that the plaintiff and the defendant, being jointly liable on a bond, were jointly sued, and a decree was made against them jointly. The plaintiff was compelled to satisfy that decree, and in this suit seeks to recover his share from the defendant. In *Ranbux Chittanjee* v. *Mudkoosoodun Paul Chowdhry* (1) the general rule was laid down by a Full Bench that a suit for contribution does not lie in a Small Cause Court under s. 6 of the Mofussil Small Cause Courts Act (XI of 1865), in the absence of a contract to contribute. In *Shaboo Majee* v. *Noorai Mollah* (2) the plaintiff and defendant had been jointly sued upon a joint bond, and a joint decree obtained against them, plaintiff having had to pay the amount sued for contribution. It was held by a Full Bench that he could not sue in a Small Cause Court. This case is on all fours with the present, and we are bound to follow it, unless some-

(1) B. L. R., Sup. Vol., 675 ; 7 W. R., 377.

(2) B. L. R., Sup. Vol., 691.

thing has since occurred by which the law has been altered. It was argued before us that ss. 43, 69 and 70 of the Contract Act (IX of 1872) have made a change in the law on this point, and that such a suit as the present has become one for "money due on bond or other contract, or for damages." We are unable to accede to this view. The sections referred to appear to us to do no more than state in written form what was the law before the Contract Act, and the consequences of a given rule of law must be the same whether it be written or remain unwritten.

A somewhat different view has been taken in a partially analogous case by the Allahabad High Court in *Nathprasad* v. *Baijnath* (1); but that view has not been followed in this Court. *Nobin Krishna Chukravati* v. *Ram Kumar Chakravati* (2) and Special Appeal No. 2,350 of 1879 (3). The appeal must, therefore, be heard on its merits.

The appeal will be dismissed with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Field and Mr. Justice Norris.

IN THE MATTER OF THE PETITION OF CHAROO CHUNDER MULLICK AND OTHERS.

CHAROO CHUNDER MULLICK *v.* THE EMPRESS.*

1882. *October* 12

High Court's Criminal Procedure Act (X of 1875), ss. 14 and 147—Commitment, Application to quash—24 and 25 Vict. c. 104, ss. 13 and 15.

The words "or other proceeding" in s. 147 of Act X of 1875, do not include a commitment, and an application to have a commitment quashed can be entertained under the provisions of that section.

Applications under s. 14 of that Act should be disposed of by the High Court in the exercise of its Ordinary Original Criminal Jurisdiction.

IN this case three persons, named Bunwari Lall, Charoo Chunder Mullick, and Chintamoney Doss, were charged before Mr. B. L.

* Criminal Motion against the order of B. L. Gupta, Esq., Presidency Magistrate of Calcutta, dated the 9th October 1882.

(1) I. L. R., 3 All., 66. (2) I. L. R., 7 Calc., 605. (3) Unreported.

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Gupta, one of the Presidency Magistrates, with certain offences under the Penal Code and Act XIV of 1866 (The Post Office Act.)

The first accused Bunwari Lall, who was a post office peon, was charged under s. 406 of the Penal Code, with criminal breach of trust in respect of a number of voting papers entrusted to him to deliver to the address of one Kedar Nauth Dutt. He was also charged under s. 409 of the same Act with criminal breach of trust as a public servant in his capacity of post office delivery peon in respect of the same voting papers; and he was further charged with having committed an offence punishable under s. 47 of Act XIV of 1866 (The Post Office Act.)

The other two accused, Charoo Chunder Mullick and Chintamoney Doss, were charged with having aided and abetted the first accused in committing the offences charged under ss. 406 and 409 of the Penal Code, and also with having abetted the offence charged under s. 47 of Act XIV of 1866; and thereby having committed an offence punishable under s. 52 of that Act; and they were further charged with having fraudulently retained or wilfully kept or obtained a voting paper, and thereby committed an offence punishable under s. 45 of Act XIV of 1866, while Bunwari Lall was also charged with having abetted the commission of that offence.

The case was heard and inquired into by Mr. B. L. Gupta, who committed all of them to the High Court for trial.

Thereupon the accused petitioned the High Court, and applied that the record might be sent for, and the order of commitment quashed and their discharge directed, on the ground that the said commitment was illegal, because the evidence given in the investigation before the Magistrate was not sufficient to justify the charges; and, even supposing it to be true, it was not sufficient in law to form a ground for the commitment, and consequently that the Magistrate should have either dismissed the charges or discharged the accused, and should not have committed them or any of them to stand their trial before the High Court.

Upon this application the record was sent for, and the case came on to be argued before a bench consisting of Mr. Justice Field and Mr. Justice Norris.

Mr. *Branson* and Mr. *M. Ghose* appeared for Charoo Chunder Mullick.

Mr. *L. M. Ghose*, for Chintamoney Doss.

Mr. *M. P. Gasper*, appeared on behalf of the Crown.

The judgment of the Court (FIELD and NORRIS, JJ.) was delivered by

FIELD, J.—In this matter an application has been made asking us to call up the proceedings connected with the commitment of three persons, Baboo Charoo Chunder Mullick, Chintamoney Doss, and Bunwari Lall, with a view to such commitment being quashed, on the ground, *first*, that as regards one of these persons, Baboo Charoo Chunder Mullick, there is no evidence which can in any view of the case incriminate him; and, *secondly*, that as regards all three accused, even if the truth of the facts deposed to by the witnesses examined before the Magistrate be assumed, these facts do not constitute any offence punishable by the Criminal law.

The application at first purported to be made under s. 147 of the High Courts' Criminal Procedure Act X of 1875, but it comes before us to-day as an application under either this section or s. 14 of the same Act.

The first question with which we now propose to deal is whether an application of this nature, an application that is to quash a commitment made by a Presidency Magistrate, can be entertained, and an order quashing such commitment made under the provisions of s. 147.

This section is as follows: "Whenever it appears to the High Court of Judicature at Fort William, Madras, or Bombay, that the direction hereinafter mentioned will promote the ends of justice, it may direct the transfer to itself of any particular case from any Criminal Court situate within the local limits of its ordinary original criminal jurisdiction, and the High Court shall have power to determine the case so transferred, and to quash or affirm any conviction or other proceeding which may have been had therein, but so that the same be not quashed for want of form, but on the merits only."

The proceeding which we are asked to quash on the present

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occasion is not a conviction but a commitment; and what we have to decide is whether a commitment is a proceeding within the meaning of the words "or other proceeding." We have considered this question since the application was first made to us the day before yesterday, and we are both of opinion that a commitment is not a proceeding within the meaning of these words. According to the usual construction, the words "or other proceeding" must be taken to mean other proceeding of the same nature, *ejusdem generis*, with a conviction. Now a conviction is a definitive decision of a Judge or Magistrate having jurisdiction to deal definitively with the matter before him, whereas a commitment is merely a preliminary proceeding by which a Magistrate, not himself having jurisdiction to deal definitively with the matter before him, sends that matter to be definitively disposed of by another tribunal. That this is a distinction well understood and indeed made by the Indian Legislature itself will appear from section 10 of the Penal Code and illustrations (*b*) and (*d*) to that section. It appears to us, therefore, that a commitment is not a proceeding *ejusdem generis* with a conviction. It was asked in the course of argument what proceedings can the Legislature be supposed to have intended by the words "or other proceeding," if these words do not include a commitment? The answer to this question is not difficult. There are numerous cases in which a Presidency Magistrate has jurisdiction to make a definitive order other than a conviction. For example, he can make an order punishing for contempt of Court (ss. 205 to 207, Chapter XV of the Presidency Magistrate's Act, IV of 1877). He can make an order requiring security to keep the peace (ss. 208 to 211 of Chapter XVI of the same Act). He can make an order requiring security for good behaviour (ss. 212 to 214 of the same Chapter). He can make an order putting a person in possession of immoveable property (s. 233 of the same Act). He can make an order for maintenance, (s. 234, 235, Chapter XVIII of the same Act). He can make an order giving compensation for a groundless charge or complaint (s. 242 of the same Act). All these orders are in their nature definitive, that is, unless brought before a superior tribunal for revision and thereupon revised, they are and remain final. It appears to us that in using the words "or other

proceeding" in s. 147 of the High Court Criminal Procedure Act, the Legislature contemplated proceedings and orders such as those which I have just mentioned.

But there are other considerations which have influenced us in arriving at a conclusion in this matter. When a proceeding is transferred to the High Court under s. 147, the High Court has power to "determine the case so transferred and to quash or affirm any conviction or other proceeding which may have been had therein, but so that the same be not quashed for want of form but *on the merits only*."

In other words the High Court, in order to the exercise of the jurisdiction hereby conferred, must proceed to consider all the evidence in the case, must come to a finding upon questions of fact, for otherwise it could not quash or affirm on the merits. In so dealing with a case, which in the ordinary course would be tried by a jury, with whom rests the decision upon questions of fact, the High Court would be superseding the jury, by whom in the usual course the case would be tried. We think it extremely improbable that the Legislature contemplated any such result as this.

Then, again, if a commitment may be quashed upon the merits under s. 147, and an application to this effect may be made by or on behalf of any accused person who has been committed, it will, in practice, be made only in those doubtful cases in which there is reason to hope that the application to have the commitment quashed will prove successful. If that hope should be found to be a mistaken one, the result would be that a prisoner, committed upon evidence sufficiently weak to make the result of a trial doubtful, would come to his trial prejudiced by the opinion of a Division Bench of two Judges pronounced against him to the effect that the commitment ought not to be quashed. It may be said that the accused person could avoid this result by abstaining from making an application under s. 147, to have his commitment quashed; and that, as he can foresee this effect of an unsuccessful application, he cannot justly complain of a result brought about by his own action. Giving to this argument all the consideration which it deserves, we cannot think that the Legislature

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intended that a Bench of two Judges should pronounce their opinion publicly upon the merits of a case, which must afterwards come before a jury.

Then again when a Magistrate has committed a case, he becomes *functus officio*, and it may be said with some show of reason that there is no case before him which can be *transferred* to the High Court.

For all these reasons it appears to us that the words "or other proceeding" in s. 147 of the High Court's Criminal Procedure Act X of 1875, do not include a commitment; and that no application to have a commitment quashed can be entertained under the provisions of that section.

But there is another section in the Act under which it may be possible that the petitioners may obtain that which they seek. I say "may be possible" because upon this point speaking for myself, I desire to express no opinion, and this for the reasons which I shall presently state. The section to which I refer is s. 14, which provides that "when any charge or portion of a charge, recorded as aforesaid, appears to a Judge of the High Court at any time before the commencement of the trial of the person charged to be clearly unsustainable, such Judge may make on the charge an entry to that effect. Such entry shall have the effect of staying proceedings upon the charge or portion of the charge," &c. Now the jurisdiction conferred by this section is a jurisdiction which may be exercised by a Judge, that is one Judge of the High Court.

Having regard to that which has been determined by the learned Chief Justice under s. 14 of the High Court Act, 24 and 25 Vic., cap. 104, we are agreed, and speaking for myself I am very strongly of opinion that, if this matter is to be heard by a single Judge, it should be heard by my brother Norris and that I ought not to sit to hear it.

The Chief Justice has determined, under the section just quoted, that Mr. Justice Norris and myself "may form a Division, Bench, and hear and determine any appeal, motion or other matter, in any civil or criminal case which may be brought before the High Court in its Appellate Jurisdiction, or which they shall order to be brought before them." Now, clearly a matter under s. 14

of the High Courts' Criminal Procedure Act is not a matter brought before the High Court in its Appellate Jurisdiction. I take it that the words, "or which they shall order to be brought before them" have reference only to the same Appellate Jurisdiction.

Then the Chief Justice has further determined that on and after the 18th September 1882, and until further order, the ordinary Original Civil and Criminal Jurisdiction of the High Court, shall be exercised by the Honorable Mr. Justice Cunningham, the Honorable Mr. Justice Norris, and the Honorable Mr. Justice Pigot sitting separately.

And the Officiating Chief Justice has determined on the 10th August 1882 that until further order the ordinary Original Criminal Jurisdiction of the Court shall be exercised by the Honorable Mr. Justice Norris. It is quite clear from this that I am not, and that my brother Norris is, a Judge, as to whom it has been determined by the Chief Justice under the provisions of s. 14 of 24 and 25 Victoria, cap. 104, that he shall sit alone for the exercise of the ordinary Original Criminal Jurisdiction of the Court; and this being so, it appears to me proper, that as this matter is one falling within that jurisdiction, it should be disposed of by Mr. Justice Norris.

I have further thought it right to consider whether this matter shall be heard by myself and my brother Norris sitting together; in other words whether I shall continue to sit with my learned brother for the hearing and determination of the matter, as a matter to be disposed of under s. 14 of the High Courts' Criminal Procedure Act, and I have decided not to do so. So long as we had not determined whether or not the matter could be dealt with under s. 147, I have continued to sit, because it has been the recent practice of this Court that matters under this section should be dealt with by the Division Bench for the time being exercising the Appellate Criminal Jurisdiction of the Court. During my experience several cases have been so disposed of. I may refer by way of example to the case of *The Empress* v. *Thompson* (1); *Wood* v. *The Corporation of the Town of Calcutta* (2); and *In re Poorna Churn Pal* (3). The

(1) I. L. R., 6 Calc., 523. (2) I. L. R., 7 Calc., 322.
(3) I. L. R., 7 Calc., 447.

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former practice was to bring applications under the section before a single Judge sitting on the Original Side of the Court. See for example the cases of *The Empress* v. *Gasper* (1), and the *Corporation of the Town of Calcutta* v. *Bheecunram Napit* (2). Whatever doubt there may be as to whether applications under s. 147 of Act X of 1875 should be heard by the Division Bench exercising the Appellate Criminal Jurisdiction of the Court, I think there can be no doubt that applications under s. 14 of the same Act must be disposed of in the exercise of the Court's Original Criminal Jurisdiction.

Section 36 of the Letters Patent of 1865 provides that any function which by these Letters Patent is directed to be performed by the High Court in the exercise of its Original or Appellate Jurisdiction, may be performed by any Judge or by any Division Court thereof appointed or constituted for such purpose under the provisions of the thirteenth section of the 24 and 25 Vict., cap. 104. This section is as follows: Subject to any laws or regulations which "may be made by the Governor-General in Council, the High Court may, by its own rules, provide for the exercise by one or more Judges, or by Division Courts constituted by two or more Judges of the said High Court of the Original and Appellate Jurisdiction, vested in such Court in such manner as may appear to such Court to be convenient for the due administration of justice."

So far as I am aware no rule has been made under this section since the date of the Letters Patent of 1865; but there was a rule made previously, and while the Letters Patent of 1862 were in force, *viz.*, "A Court for the exercise of the Ordinary Original Criminal Jurisdiction of this Court may be held before one Judge, and two or more Courts may sit at one time, in each of which there shall be one Judge,"—(See Rule 58, Belchambers, p. 87). As there is here an express provision, Rule 51 does not apply, which provides that all powers and functions vested in the Court by the Letters Patent, *which are not otherwise expressly provided for by the Rules of Court*, may be exercised by a single Judge, *or* by a Division Court consisting of two or more Judges.

(1) I. L. R, 2 Calc, 278. (2) I. L. R, 2 Calc, 200.

The operation of the rule above first quoted (No. 58) is saved by the second section of the Letters Patent of 1865, which provides that all rules and orders in force immediately before the publication of these Letters Patent, shall continue in force, except so far as the same are hereby altered until the same are altered by competent authority.

It would appear to follow that, while there is a single Judge there is no Division Court appointed or constituted under s. 13 of the 24 and 25 Vic., cap. 104, to exercise the Original Criminal Jurisdiction of the Court, and that, therefore, this jurisdiction should not be exercised in this or any case by a Division Court consisting of two Judges.

It may be that this result would be altered by reading the words "subject to any laws or regulations which may be made by the Governor-General in Council" in s. 13, 24 and 25 Vict., cap. 104, with sub-section 2, section 2 of the General Clauses Act I of 1868: "Words in the singular shall include the plural," and that "a Judge" in s. 14 of Act X of 1875 may thus be held to include two or more Judges. But as this may be arguable, and as my brother Norris is undoubtedly competent to act alone, I think it will be better that he alone should proceed to deal with the case, more especially as, if there should be a difference of opinion, my opinion as that of the Senior Judge would prevail, and there would be this result that a Judge, whose competency to exercise jurisdiction may be arguable, would overrule a Judge as to whose competency there can be no doubt.

APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice Field.

1882 *September 5.*

RAM DHUN DHUR (PLAINTIFF) *v.* MOHESH CHUNDER CHOWDHRY AND OTHERS (DEFENDANTS).*

Direction in will for payment of debts—Decree against heirs for debt due by ancestor—Charge on property—Apportionment of mortgage debt amongst several properties mortgaged.

A testator by his will directed payment of all his debts, and subject thereto devised his property to his heirs. After one of the testator's creditors had obtained a decree against the heirs in their representative capacity, which by its terms was to be satisfied out of the assets left by the testator, one of the heirs mortgaged his share in twelve properties left by the testator. Subsequent to the mortgage one of the mortgaged properties was sold in execution of the creditor's decree.

The mortgagee afterwards brought a suit against the mortgagor and obtained a decree on his mortgage.

Held, that as neither the direction in the will for payment of debts nor the decree in the creditor's suit created a charge on the property of the testator, the property sold in execution of the creditor's decree had been sold subject to the mortgage, and the mortgagee was entitled to execute his decree against that property.

Bessayet Hossein v. *Dooli Chund* (1) distinguished.

It appearing that the mortgagee deliberately abstained from executing his decree against eleven properties which still remained in the possession of the mortgagor, but proceeded against the one property which had passed out of the mortgagor's possession, the mortgage debt was directed to be apportioned between the twelve properties, and the mortgagee was not to be allowed to take out execution against the property which had passed out of the mortgagor's possession, except for the amount which should be apportioned to such property, without satisfying the Court that he had made every possible effort to execute the remainder of his decree against the other eleven properties.

BRINDABUN by his will directed the payment of his debts, and subject thereto devised his property to his heirs; he mentioned

* Appeal from Appellate Decree No. 1385 of 1881 against the decree of Baboo Grish Chunder Chowdhry, Subordinate Judge of Chittagong, dated the 8th June 1881, affirming the decree of Baboo Anund Chunder Mullick, First Munsiff of Ramjan, dated the 30th of March 1880.

(1) I. L. R., 4 Calc., 402.

certain debts specifically including one to Ram Jibun, and went on to say that payment should be made of all his debts present and future.

The heirs of Brindabun were his four sons, one by name Pitamber.

On the 28th February 1876 Ram Jibun obtained a decree against Pitamber and his brothers in their representative capacity as heirs of Brindabun, which by its terms was to be satisfied out of the assets left by Brindabun. On the 29th June 1876 Pitamber mortgaged to the plaintiff his four-anna share in twelve properties left by his father. On the 15th August 1877 one of the properties included in the mortgage was sold in execution of the decree which had been obtained by Ram Jibun, and Mohesh Chunder Chowdhry became the purchaser at the sale. On the 16th November 1877 the plaintiff obtained a decree against Pitamber for the amount due on the mortgage.

Several creditors, both of Brindabun and of Pitamber, who had obtained decrees, applied for a rateable distribution of the surplus proceeds of sale, and the plaintiff claimed a right to the whole of Pitamber's share of the surplus, but his application was on the 28th February 1878 rejected on the ground of his not having applied in time, and the surplus proceeds were distributed amongst the creditors who had applied.

On the 14th July 1878 the plaintiff attached the twelve mortgaged properties in execution of his decree, but on a claim by Mohesh Chunder Chowdhry the property which he had purchased was on the 24th February 1879 released from attachment.

The plaintiff took no proceedings to bring the remaining properties to sale, but on the 20th June 1879 instituted this suit against (1) Mohesh Chunder Chowdhry; (2) the creditors amongst whom the surplus sale proceeds had been distributed; and (3) Pitamber; claiming to have the order of the 24th February 1879 set aside, and for a declaration that the property which had been sold was liable to satisfy his decree, and in the alternative for a declaration that he was entitled to Pitamber's four-anna share in the surplus proceeds of sale as against the creditors who had shared in the distribution of them.

Mohesh Chunder Chowdhry and the creditors contended amongst

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other things that the mortgage was fraudulent, and that the plaintiff was acting in collusion with Pitamber in order to defeat creditors. The creditor-defendants further set up limitation as a bar to the claim against them.

Pitamber did not defend the suit. The first Court found the plaintiff's claim against the creditors to be barred by limitation under Art. 13, Schedule II of Act XV of 1877, the suit not having been instituted within one year of the order of the 28th February 1878 rejecting the plaintiff's application to share in the surplus sale proceeds.

The first Court further found the mortgage to be fraudulent, and accordingly dismissed the suit.

On appeal the Subordinate Judge agreed with the Munsiff's finding on the claim against the creditors, but held that fraud as regards the mortgage had not been satisfactorily established. He held, however, that the direction in Brindabun's will had the effect of making his debts a charge on the properties left by him, and that the devisees taking the properties subject to the charge coulds not alienate them so as to defeat the rights of creditors whose debts constituted the charge. He also held that the creditor's decree was virtually a decree against the testator's properties, and that the mortgage being subsequent to the decree, the mortgagee took subject to a charge created by the decree. He accordingly dismissed the appeal.

The plaintiff appealed to the High Court.

Baboo *Sreenath Dass* and Baboo *Aukhil Chunder Sen* for the appellant.

Baboo *Sreenath Banerjee* and Baboo *Bama Churn Banerjee* for the respondents.

The judgment of the Court (WILSON and FIELD, J.J.) was delivered by

WILSON, J.—We think that the order of the lower Appellate Court must be varied in this case. The suit is for two distinct things. In the first place it is a suit in which the second defendants are principally interested, with the view of giving the plaintiff a share of the sale proceeds of certain property. With regard to this

claim it is enough to say that we see no ground whatever for differing from the view taken by the Court below; but then there is a matter of greater difficulty, namely, the suit as against the first defendant. The object of that is to enforce the mortgage decree which the plaintiff has obtained against the former owner of the property, *viz.*, Pitamber, against the property which has now passed into the hands of the first defendant, who has purchased it at an auction sale in execution of a money decree. *Primâ facie* the plaintiff is entitled to that, because the sale in execution of the money decree was the sale of the right, title and interest of the mortgagor, and there was nothing to show that the sale was not what the law ordinarily contemplates in such a case, that is to say, a sale subject to the mortgage lien. But two reasons have been given for holding that the mortgage lien was superseded by the rights of the person at whose suit the execution sale took place. The first is that the decree which was against the representatives of the original owner of the property in question declares that the property of the original owner is liable. But the decree is in the ordinary form of a decree made in a suit against the representative of a deceased person. It is a decree which is known to English lawyers as *De bonis testatoris*, a decree which by its terms is to be satisfied out of the assets left by the deceased person. It appears to us that it has no other effect than as a mere money decree, and has not the effect of creating a charge upon the property. This case differs from the case of *Bazayet Hossein* v. *Dooli Chund* (1), where the decree in question was a decree which distinctly bound the property.

The second ground urged for holding that the judgment-creditor's debt had priority over the mortgage, was by reason of the will of the testator. In that he undoubtedly directs payment of his debts, and he directs that subject to the payment of those debts, the property should be taken by his heirs, and he mentions certain debts specifically including the debt of the judgment-creditor. But he goes on to say that payment is to be made of all his debts, present and future. That, therefore, is simply a general direction to pay all his debts out of his estate, and that, upon the authorities, clearly creates no charge. It directs nothing more

(1) I. L. R., 4 Calc., 402.

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than what the law requires every executor, or heir, or other representatives to do, that is, to pay the debts of the testator out of his assets. It appears to us, therefore, that the plaintiff is entitled to execute his decree against the property in question. Of course it would have been otherwise if the finding of the Munsiff had stood to the effect that the transaction was fraudulent; but we feel ourselves bound, in spite of the suspicious circumstances of the case, by the finding of the lower Appellate Court on this question which is one of fact. The plaintiff is, therefore, entitled to execute his decree against the property. On the other hand we find that, although the mortgage includes twelve pieces of property, and the plaintiff's decree covers those twelve pieces of property, he deliberately abstains from executing his decree against eleven properties, which still remain in the possession of the mortgagor, and comes into Court with this suit, in which he tries first to proceed against the execution-creditor, and failing that, against the purchaser from his debtor, the object being apparently to make everybody but his debtor pay the debt due to him. It appears to us that he cannot be allowed to do that. All the parties interested are before the Court. Pitamber is a party, plaintiff is a party, and the first defendant is a party. On the inquiry that we propose to direct all these persons should be heard. There will be an inquiry in the first instance how the mortgage debt should be apportioned between the twelve properties, and what portion of it should be charged upon the property which the plaintiff now seeks to charge. The plaintiff will not be allowed to take out execution against this property, except for the amount which upon such inquiry should be properly charged upon it, without satisfying the Court that he has made every possible effort to execute the remainder of his decree against the other eleven properties.

In this way the decree of the lower Appellate Court will be varied, and the case will be remitted to the Court of first instance for the purposes of the inquiry above directed.

Under the circumstances of the case we think it undesirable to make any order for the costs of this appeal. The appellant has succeeded in part and he has failed in material parts of his case,

and his conduct in the case is not such as to entitle him to any indulgence.

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The second defendants are entitled to their costs of this appeal, which as regards them is dismissed.

Decree varied.

Before Mr. Justice Tottenham and Mr. Justice Bose.

MODHO KOOERY AND OTHERS (DEFENDANTS) *v.* TEKAIT RAM CHUNDER SINGH (PLAINTIFF).*

1882 *July* 27.

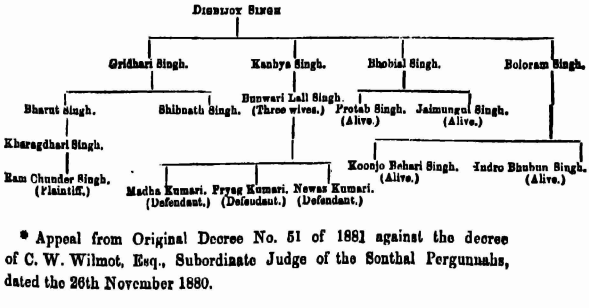
Ghatwal—Adverse possession—Limitation in suit by landlord against tenant of a permanent tenure—Limitation Act XV of 1877, *Sch.* 2, *Art.* 139.

Where a permanent tenure has been granted by a ghatwal, if the successor of such ghatwal, being one of the ghatwals, to whom Regulation XXIX of 1814 applies, wishes to resume that tenure, he must bring his suit within twelve years after succeeding to the ghatwali estate.

The possession of the tenant is adverse to him from the time of the decease of his immediate predecessor.

Article 139, Sch. 2 of Act XV of 1877, regarding suits by landlords to recover possession from tenants giving twelve years time from the determination of the tenancy, does not apply to cases in which the plaintiff seeks to recover a tenure permanent in its nature and not determinable by notice

THIS was a suit to recover direct possession in ghatwali right of turuf Lalgurh as part of the Pathrole ghatwali, held by Ram Chunder Singh. The following genealogical table shows the state of the family:—



* Appeal from Original Decree No. 51 of 1881 against the decree of C. W. Wilmot, Esq., Subordinate Judge of the Sonthal Pergunnahs, dated the 26th November 1880.

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Digbijoy Singh was the plaintiff's great grand-father, and was ghatwal of Pathrole, one of the ghatwali mehals of Sarut Deoghur, known as a ghatwali of Birbhum, falling under the provisions of Regulation XXIX of 1814. The three defendants in the suit were the widows of Bunwari Lall Singh, who was a grandson of Digbijoy through Kanhya Singh, his second son.

On Digbijoy's death he was succeeded by his eldest son Gridhari Singh as ghatwal of Pathrole, and he in his turn was succeeded by Bharut Singh and Kharagdhari Singh, who each in their turn held the estate until their death. Kharagdhari Singh died in Jeyt 1272 (May 1864), and the plaintiff being at that time nine years of age, his estate was placed under the Court of Wards, and remained under its management until Bhadro 1280 (August-September 1873). Bunwari Singh died in Assar 1280 (June-July 1873) and the Lalgurh Estate on his death also passed into the custody of the Court of Wards who defended this suit on behalf of the three widows.

The plaintiff contended that the possession of turuf Lalgurh and its villages by the Court of Wards was illegal, as it was a portion of his estate. The defendants alleged that Digbijoy Singh granted the turuf to his son Kanhya Lall Singh in mokurruri for khorposh or maintenance at a fixed yearly rent of Rs. 103-7-6, and doshi salami Rs. 2 more; and the plaintiff, while admitting that during his minority the Court of Wards received rent at that rate, alleged that even if such a mokurruri lease had been granted by Digbijoy, it was not a valid grant, and could not be maintained in law, as no ghatwal had power to alienate any part of his estate.

On the 19th November 1875 the plaintiff sent an application or notice to the Deputy Commissioner for the Court of Wards, asking for the release of the Lalgurh Estate. This was acknowledged, and after certain steps had been taken, the plaintiff was, on the 7th September 1876, referred to the Civil Court. The plaintiff accordingly, after having memorialised the Bengal Government, and being directed on the 8th June 1878 to bring a regular suit if so advised, filed this suit on the 25th June 1879.

Part of Mouzah Modhupore, belonging to turuf Lalgurh, having been taken up for the construction of the East Indian Railway,

the Court of Wards, on behalf of the plaintiff, who was then a minor, brought a suit in the Civil Court of zillah Birbhum, to obtain compensation for the said land. In this case Bunwari Lall Singh, the husband of the present defendants, pleaded that Digbijoy Singh had granted the mokurruri to his son Kanhya Lall Singh. Bunwari Lall died while the suit was pending, but the Subordinate Judge, on the 23rd October 1873, awarded a portion of the compensation to the plaintiff and a portion to Bunwari Lall's widow. On attaining his majority the plaintiff filed an appeal in the High Court against that decree, and it was decided on the 15th March 1875. In that appeal the High Court held that the three widows had no right to hold possession of turuf Lalgurh, and that Digbijoy Singh had no power to grant the mokurruri alleged, and that it was not binding on the plaintiff. The whole of the compensation awarded was accordingly made over to the plaintiff.

In the present suit the plaintiff alleged that his cause of action arose on the 19th November 1875, the date on which the notice was given, and prayed for possession of turuf Lalgurh and for mesne profits from 1282 (1875-76) to the date of the delivery of possession.

The Deputy Commissioner, on behalf of the three defendants under the Court of Wards, set up the mokurruri khorposh lease, and pleaded that it had been created before the permanent settlement, and had ever since been enjoyed as a permanent hereditary tenure by the defendants and their predecessor in uninterrupted descent at a rent which had never been changed; that as the tenure was created before Regulation XXIX of 1814 was enacted, that Regulation did not apply to it; that the plaint showed that the cause of action had arisen more than twelve years ago; and that the plaintiff having attained his majority more than three years previously the suit was barred by limitation; and, further, that the plaintiff had received rent from them and acknowledged the tenure, and consequently ratified the grant of the land made by his ancestor. The Subordinate Judge decreed the suit in favor of the plaintiff, holding that he was not barred by limitation; that the grant by Digbijoy Singh, whatever it might have been, was not binding on the plaintiff; and that it had not been proved that the plaintiff had

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ratified this grant. He, however, held that the defendants could not be considered as trespassers, and that the plaintiff was not entitled to the mesne profits he claimed. The decree was dated the 26th November 1880, and directed that it should take effect as from the 1st Bysack 1288 (12th April 1881). Against this decree the defendants now appealed to the High Court, and the plaintiff also filed a cross appeal against that portion of the decree which disallowed the mesne profits, and postponed the date from which it should take effect, and also against the ruling that the question of the defendants' title was not *res judicata*.

The Assistant Legal Remembrancer (Mr. *Kilby*) and *The Senior Government Pleader* (Baboo *Annoda Persad Banerjee*) for the appellants.

Baboo *Sreenath Dass*, Baboo *Mohiny Mohun Roy* and Baboo *Koroona Sindhoo Mukerjee* for the respondent.

The judgment of the Court (TOTTENHAM and BOSE, JJ.) was delivered by

TOTTENHAM, J.—The subject of this suit is a property called turuf Lalgurh, &c., which forms a portion of the ghatwali of Pathrole, and this is one of the Birbhum ghatwalis, though it is situated within the Sonthal Pergunnahs.

The plaintiff Ram Chunder Singh is the ghatwal; and the defendants, appellants in this appeal, are the three widows of Bunwari Lall Singh. The object of the suit is to recover from the defendants possession of the property in suit, with a declaration by the Court that the mokurruri khorposh lease alleged to have been granted by Digbijoy Singh to Kanhya Lall Singh, the father of Bunwari Lall, is not binding upon the plaintiff, and that it is invalid in law. The plaintiff further prays for mesne profits from 1282 to 1285 (1875-76 to 1879.)

Digbijoy Singh was, in his day, ghatwal of Pathrole, and was the great grandfather of the plaintiff. The estate of the defendants is under the management of the Court of Wards, and their defence has been conducted by it. It is alleged that the property was granted to Kanhya Lall (who was second son of Digbijoy) as a shikmi mokurruri khorposh tenure, at a rental fixed in perpetuity; that it was created before the permanent

settlement; and that it has ever since its creation been possessed as a permanent hereditary tenure by the defendants and their predecessors in uninterrupted descent at a rent which never has been changed.

The plaintiff is fifth in descent from the grantor, but the first defendant's husband was the son of the original grantee. The uninterrupted possession is not disputed, nor is it contended that any of the plaintiff's predecessors ever sought to resume the grant. Plaintiff, when his father died in 1865, was a child of nine years, and his estate was managed by the Court of Wards. During his minority, which terminated in 1873, the Court of Wards recognized Bunwari Lall as holding a valid title; and this suit was not instituted until 1879, nearly six years after the plaintiff's majority.

The suit was tried before the Subordinate Judge of Deogurh, who held that the grant was in its nature one for maintenance and not saddled with any condition as to police duties; that, whatever, its nature, it was not binding upon the plaintiff; that the plaintiff had not ratified it by any act of his; and that the suit was not barred by limitation. He accordingly gave a decree in favor of the plaintiff for possession, to take effect from the 1st day of the Bengali year 1288 (12th April 1881). He disallowed the claim for mesne profits.

The defendants, having appealed against this decree, the plaintiff has filed a cross appeal as to the mesne profits, and against the lower Court's ruling that the question of the defendants' title is not *res judicata* in favor of the plaintiff by reason of the decree of this Court, dated the 15th of March 1875, in a suit regarding certain compensation money paid on account of land taken up for the East Indian Railway, where it was determined that Bunwari Lall had no valid right in the lands pertaining to their ghatwali.

The main contention which we have to consider in the appeal of the defendants' is that the suit is barred by limitation, and on the merits it has been urged that the grant to Kanhya Lall was, on various considerations, a valid one, binding upon the successor of the grantor. Obviously we must first deal with the question of limitation. The learned Counsel for the appellants submitted

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that, inasmuch as the grant had been in force for more than 60 years before the suit was brought, it was protected by s. 3 of Regulation II of 1805; but we think that that Regulation having been repealed, its provisions cannot avail the defendants unless it be shown that, while it was still in force, the defendants had already acquired an indefeasible title by 60 years enjoyment of the property under the grant made by Digbijoy Singh. But the Regulation had already become obsolete when it was repealed by Act VIII of 1868; and, although it was alleged that the grant was made before the permanent settlement, we have no evidence in its favor earlier than a receipt for rent of the year 1211 B. S. (1804—5 A. D). It has not been shown to us that a good title, by 60 years' possession, had become perfected while the Regulation was still operative; and it apparently ceased to be operative when Act XIV of 1859 came into force in 1862.

But the limitation is pleaded on another ground, *viz.*, that conceding that the plaintiff, as ghatwal, was not bound by the act of his remote ancestor and predecessor, or by the ratification of that act by his more immediate predecessors, still he would be bound to sue to enforce his right to set it aside within twelve years of the accrual of that right, or within twelve years from the date when the possession of the defendants became adverse to him; and for this contention we find authority in *Babaji* v. *Nana* (1) and in *Petamber Baboo* v. *Nilmony Singh Deo* (2). The plaintiff's father and immediate predecessor as ghatwal died in 1865, so that the possession of the defendants then became adverse to the plaintiff, and, notwithstanding his minority, which terminated in 1873, limitation then commenced to run, but the suit was not brought until fourteen years afterwards. When the plaintiff reached his majority there were still four years remaining within which he might have brought the suit; but he allowed a further period of two years to elapse, and it lies upon him to show that his suit is not barred by limitation. For the plaintiff it was contended that the suit is not barred because it is one by a landlord to recover possession from a tenant, for which the law allows a period of twelve years running from the date when the tenancy is determined. And it is alleged that the tenancy

(1) I. L. R., 1 Bom., 535. (2) I. L. R., 3 Calc., 793.

was determined only in 1875, when the plaintiff refused to accept the rent tendered by the Court of Wards on behalf of the defendants. Plaintiff claims a period of twelve years from 1875; and his suit was brought within four. The lower Court has held that, if the defendants be considered merely as tenants, no question of limitation arises; but that if the title set up by the defendants as mokurruridars gives them a right to plead limitation against the plaintiff, the limitation will run only from the date when plaintiff had notice of the claim to such title, and upon the evidence the Court held that the first notice of it to the plaintiff was in 1875, when the suit for the compensation money above mentioned was brought. Thus it was held that the suit was not barred by limitation.

We think it is clear that the article in the Schedule No. 2 of the Act, which provides for a suit by a landlord to recover possession from a tenant, and gives twelve years from the determination of the tenancy, refers to suits in respect of tenancies in which the leases have expired, and so have terminated, or in respect of tenancies at will terminable by due notice. It does not refer to a suit by which the plaintiff seeks to recover from the holder of a title permanent in its nature.

It is certain that the defendants are in possession of the property in suit by virtue of a title which, if valid, is of a permanent character, not *determinable* by notice from the plaintiff. If it is not valid, the defendants can only be got rid of by a suit in which they are entitled to plead, and to show that they are protected by the rules of limitation. Then if the plaintiff be considered to be a reversioner, the period of limitation runs from the date when his estate fell into possession, *viz.*, the date of his father's death in 1865, and in this view we should be compelled to say that his suit is too late. It was argued that, as he was formally appointed to be ghatwal only in 1873, after he came of age, the twelve years should be counted from that date; but we are of opinion that this contention is untenable, for he was practically invested with the ghatwali when his father died, and the estate was taken on his behalf under the management of the Court of Wards. The perwana of appointment of ghatwal in 1873 was a mere formal imposition upon him of the duties and responsibilities of

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the office which during his minority he was incompetent to undertake.

And if the suit be treated as one to which no article of the Schedule specially applies, then it is one which must be brought within twelve years from the time when the possession of the defendants became adverse to the plaintiff; and in such case, too, it is clear that the possession has been adverse from the moment of the plaintiff's succession in the room of his father.

As regards notice to the plaintiff of an adverse claim on the part of the defendants, we think that it is not a case in which any special notice was required. It is not a case as between a zemindar and a ryot who, having been dealt with as an ordinary ryot, sets up a mokurruri claim. Here the plaintiff is a ghatwal, and, *ipso facto*, claims the right of khas possession of the whole of the ghatwali property. It is not pretended that the defendants or their predecessors were ever considered to be ordinary ryots, or to hold under any title less than that of a mokurruri khorposh grant. We hold, therefore, that there is no valid ground for the contention that limitation did not begin to run against the plaintiff in 1865, when his father, the last ghatwal, died; and we must hold that the suit is barred by limitation, and should have been dismissed on that ground by the lower Court.

This finding makes it unnecessary to inquire further into the validity of the grant made by Digbijoy to Kanhya Lall. We may observe, however, that it could not be affected by Regulation XXIX of 1814, as it was made before that Regulation was passed. Our decision on the question of limitation renders it unnecessary also to dispose of the plaintiff's plea of *res judicata*.

We reverse the decree of the lower Court, and dismiss the suit with costs of both Courts.

Appeal allowed.

Before Mr. Justice Mitter, Offg. Chief Justice, and Mr Justice Norris.

AJOODHYA PERSAD (PLAINTIFF) *v.* COLLECTOR OF DURBHUNGAH (ONE OF THE DEFENDANTS)*

1882 *August 4.*

Partition between owners of separate shares in permanently settled estate—Effect of as against Government.

In the year 1226 F (1819) a fourteen-anna eight-gunda share of a certain mouzah was permanently settled. The remaining one-anna twelve-gunda share was permanently settled in 1861. This share was sold for arrears of Government revenue in 1873, and purchased by the plaintiff, who subsequently applied to the Collector for partition under the Butwara Act. The Collector refused to partition, upon the ground that the Act was not applicable to the partition of a mouzah held jointly by the proprietors of two separate estates. The plaintiff then brought the present suit, to which he made the Collector a party, to obtain a declaration that he was entitled to have his share separated from the fourteen-anna eight-gunda share by metes and bounds, and also for a decree directing a partition of the whole mouzah into two parts.

Held, that so far as the plaintiff on the one hand, and the owners of the fourteen-anna eight-gunda share on the other, were concerned, the mouzah could be partitioned, but that such partition would not be binding upon the Government unless by consent.

Baboo *Saligram Singh* for the appellant.

Baboo *Annoda Churn Banerjee* for the respondent.

THE facts of this case sufficiently appear from the judgment of the Court (MITTER, O.C.J., and NORRIS, J.) which was delivered by

MITTER, O.C.J.—It appears that a fourteen-anna eight-gunda share of a mouzah named Mohamedpur was settled permanently in the year 1226 *Fusli* (1819). The number of this share of the mouzah in the Collector's Towji is 223. The defendants, second and third parties, are now the owners of this estate. The remaining one-anna twelve-gunda share of the mouzah in question was permanently settled in the year 1861 with Fakir Misser and

* Appeal from Appellate Decree No. 1269 of 1881, against the decree of H. W. Garden, Esq., District Judge of Tirhoot, dated the 2nd of May 1881, reversing a decree of Baboo Koylash Chunder Mookerjee, Second Sub-Judge of Mozufferpore, dated the 30th of March 1880.

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others. The number of this latter estate in the Collector's Towji is 4,945. In the year 1873, the estate No. 4,945 was sold by auction for arrears of Government revenue, and was purchased by the plaintiff.

On the 28th of July 1879 the plaintiff brought this suit for obtaining a declaration that he is entitled to have the one-anna twelve-gunda share of this monzah separated from the fourteen-anna eight-gunda share by metes and bounds, and also for a decree directing a partition of the whole mouzah into two parts, so that the lands of his estate may be defined as separate and distinct from the estate No. 223, belonging to the second and third party defendants. It appears that before this suit was brought, the plaintiff had made an application to the Collector for the partition of the lands of Mouzah Mohamedpur under the Butwara Act; but the Collector refused the application on the ground that the said Act was not applicable to the partition of a mouzah which is held jointly by the proprietors of two separate estates.

The Collector of Durbhungah has also been made a party in this case.

The suit was defended by the Collector on behalf of Government, and by the second party defendant.

The defendant, second party, stated in his written statement that the lands of the plaintiff's estate were separate from the lands of the estate No. 223.

The Collector rested his defence simply upon the ground that the lands of the two estates could not be partitioned under the provisions of the Butwara Law, *viz.*, Beng. Act VIII of 1876.

The Court of first instance made a decree in favor of the plaintiff, directing that the one-anna twelve-gunda share, belonging to the plaintiff, should be separated from the lands of the estate No. 223. The decree also contained a provision to the effect that the Collector of Durbhungah should be requested to carry out the partition, and that if he refused to do so, the partition should be effected by the Civil Court Ameen in execution of that decree.

Against that decree the Collector of Durbhungah, on behalf of the Government of Bengal, appealed, and the District Judge has dismissed the suit, both against the Government as well as the

owners of the estate No. 223, upon the ground that the lands of Mouzah Mohamedpur cannot be partitioned under the provisions of Beng. Act VIII of 1876.

Against the decision of the District Judge, this appeal has been preferred by the plaintiff, and the Collector of Durbhungah, representing the Government of Bengal, is the only respondent who has appeared to oppose the appeal.

We are of opinion that, so far as the plaintiff, the owner of the estate No. 4,945, on the one hand, and the defendants, second and third parties, on the other hand, are concerned, there should be a decree for the partition of Mouzah Mohamedpur. It has been found that this mouzah is held by the owners of these two estates in the proportion of one-anna twelve-gundas, and fourteen-annas eight-gundas respectively. It is an ordinary incident of a property held jointly by two or more persons, that there should be a partition by metes and bounds, whenever one or more of the owners desire it. When all the joint owners of a property do not agree in holding it jointly, constant strifes and quarrels are likely to arise. It would be against good morals to compel joint owners to hold property jointly against their will. Therefore, so far as the plaintiff, on the one hand, and the defendants, second and third parties, on the other, are concerned, the District Judge was not right in dismissing the suit for a partition.

The only question upon which we entertain some doubt is, whether the partition should be so effected as to be binding upon the Government. Whatever may be the rights of joint owners *inter se*, as to the right of partition, we fail to see any tangible ground for laying down that such a right also exists in favor of one of two grantees of a joint estate as against the grantor.

Under the terms of the grant, the grantees have a right to enjoy the property in the estate in which it is granted. They cannot, against the will of the grantor, enforce a partition as against him. It seems to us, therefore, that unless the Government of Bengal, represented by the Collector of Durbhungah in this case, be willing to have a partition of this mouzah effected, the only decree that can be passed in the case is a decree for

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partition to be binding between the plaintiff and the second and third party defendants.

Having regard to the facts stated in the plaint and established most clearly by the evidence, it seems to us that it will be for the interests of the Government to consent to a partition being made of the mouzah. The estate No. 4,945 was, as already stated, permanently settled in the year 1861, and it was within twelve years of that time brought to sale for arrears of Government revenue. It is alleged in the plaint, and proved by the plaintiff, that owing to the lands of this estate being joint with the lands of the estate No. 223, he has not been able to collect even such an amount of rent as would be sufficient to discharge the Government dues. In this state of things it seems to us desirable that a partition should be effected of this mouzah. A partition which may be binding not only upon the present owners of the two estates, but also upon the Government and future auction-purchasers for arrears of Government revenue.

But in our opinion we cannot decree this suit, and direct a partition of the mouzah to be made, so that it may bind the Government, unless the Government withdraw their opposition to the suit and consent to the partition. It is true that we can award a decree in favor of the plaintiff for a partition of the mouzah which will be binding upon the defendants, second and third parties. But it is desirable, if there is any chance of the plaintiff obtaining the sanction of the Government, that the decree for partition should be made with the consent of the Government, so that it may be binding, in future, upon all the parties to this suit.

The plaintiff, as already stated, made an application to the Collector under the Butwara Act, and the Collector refused to effect the partition, because the Act, in his opinion, was not applicable to the facts of this case. We entirely agree in that view of the law; and probably, therefore, the Collector would not be competent, without the sanction of the higher executive authorities, to give his consent, on behalf of Government, to a partition of this mouzah, so as to bind this Government. We, therefore, allow the plaintiff six months time from this date to take proper

steps for obtaining the consent of Government to a partition of this mouzah. On the expiration of that time, the case will be brought up again for final disposal. We reserve the question of costs.

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Decree modified.

Before Mr. Justice Wilson and Mr. Justice Macpherson.

JOYUNTI DASI (PLAINTIFF) *v.* MAHOMED ALLY KHAN AND OTHERS (DEFENDANTS).*

1882 *July* 27.

Beng. Act VIII of 1869, *s.* 27—*Limitation—Suit for possession—Title.*

The limitation provisions of s. 27, Beng. Act VIII of 1869, have no application to a case in which the plaintiff relies upon his title and seeks to recover possession upon the strength of that title, and in which the defendant denies that title.

Gooroo Doss Roy v. *Ramnarain Mitter* (1); *Nistarinee* v. *Kali Pershad Dass Chowdhry* (2); and *Nilmadhub Shaha* v. *Srinibash Kurmokar* (3) referred to.

THE plaintiff in her plaint in this case stated as follows: "There was a jote in the name of my husband Joy Singh Dey Mondal, comprising puras 17-14-15 cottas of land, minus 1 pura granted as *inam* (reward), that is to say, puras 16-14-15 cottas of land bearing an annual jumma of Company's Rs. 27-14," within the lakhiraj talook of six of the defendants. "My husband and, after his death, I owned and held possession by payment of the rent of the said 1 pura of land obtained as *inam* or reward, and puras 16-14-15 cottas by jote right, that is to say, of puras 17-14-15 in all, for upwards of 20 years." The plaint then stated that between the 2nd and 15th of December 1875, the defendants, "fraudulently and in collusion with one another," had taken away paddy and mustard seed, also cut and carried away grass and bamboos from the lands claimed, and had thrown down and carried away the materials of some tiled huts which stood on the

* Appeal from Appellate Decree No. 1915 of 1880, against the decree of T. M. Kirkwood, Esq., Judge of Mymensingh, dated the 4th August 1880, reversing the decree of Baboo Nobin Chunder Ghose, First Subordinate Judge of that district, dated the 8th May 1879.

(1) B. L. R. Sup Vol., 628: 7 W. R., 186. (2) 21 W. R., 53.
(3) I. L. R., 7 Calc., 442.

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said land, "and thus dispossessed me from the said puras 17-14-15 cottas of land, and the defendants are now wrongfully and unlawfully enjoying possession of the said land without any right whatsoever." The plaintiff prayed "that my jote right and *inam* rights to the lands, from which I have been dispossessed, may be declared, and that possession of the same be awarded to me;" and also for damages for the crops carried away.

The Court of first instance fixed twelve issues:—the first, whether the suit was governed by the provisions of the rent law; the seventh, limitation; and the ninth, "does the land in suit constitute the *inam* and jote of the plaintiff as alleged by her, and is her allegation of possession and dispossession true." On these issues it was decreed "that the plaintiff's jote right to the land in suit be declared, and that the plaintiff do get possession of the same." The claim for damages was dismissed on the ground of limitation, the plaint not having been filed till the 18th of June 1878. On appeal the Judge said:—

"Plaintiff in this suit, as her pleader now admits, claims nothing more than an occupancy right. Six of the persons she is suing are, she says, her landlords, and she is suing them for recovery of possession as a ryot, who has been illegally ejected by them; and the other six defendants are the agents of her landlords who took part in ousting her. This is a suit then for which s. 27 of Beng. Act VIII of 1869 lays down one year as the period within which it must be brought. It does not avail to say that the suit also claimed some of the land as *inam*, and that a claim to movables was included. Such additional claims would not take the bulk of the claim, if as above, out of the one year rule; and, moreover, all such additional claims have been rejected by the lower Court as untenable; nor can the fact that the appellants have repudiated her claim to be their ryot in any way alter the limitation law applicable to the plaintiff on her own plaint. In the case of *Brindabun Chunder Sirkar* v. *Dhununjoy Nushkur* (1) (JACKSON and MCDONELL, JJ.) it is laid down: 'The right, if any, which the plaintiff had in the present case is created entirely by his continued occupancy of the land. It does not rest upon any grant; it is not in general transferable, and it appears to me that if her tenant desires to maintain that right and have himself replaced in the position which he occupied before ouster, he is bound to bring a suit under s. 27 of Bengal Act VIII of 1869, within one year from the date of dispossession. I think, therefore, that the plaintiffs' suit in this case ought to fail.' That ruling, it appears to me, is quite conclusive on the subject."

(1) I. L. R., 5 Calc., 246.

The Judge then referred to *Dhurjobutty Chowdhrain* v. *Chamroo Mundul* (1); *Gooroo Dass Roy* v. *Ram Narain Mitter* (2); *Nistarinee* v. *Kali Pershad Dass Chowdhry* (3); and *Gunga Gobind Roy* v. *Kala Chand Surma* (4), distinguishing them from the case first cited, and decreed the appeal. The plaintiff appealed to the High Court.

Baboo *Mohiny Mohun Roy* and Baboo *Rash Behary Ghose* for the appellant.

Baboo *Gopaul Lall Mitter* and Baboo *Jogesh Chunder Roy* for the respondents.

The judgment of the Court (WILSON and MACPHERSON, JJ.) was delivered by

WILSON, J.—In this case the District Judge has reversed the decree of the Subordinate Judge, and dismissed the suit, on the ground that it is barred by s. 27 of Beng. Act VIII of 1869, as not having been brought within a year after the plaintiff was dispossessed.

We are unable to agree with the view taken by the District Judge. It has been repeatedly decided both under s. 23 of Act X of 1859, and under the corresponding s. 27 of Act VIII of 1869, that the one section or the other has no application to a case in which the plaintiff relies upon his title and seeks to recover possession upon the strength of that title, and in which the defendant denies that title.

Such a suit might have been tried in a Civil Court while Act X of 1859 was in force; and such suit is not subject to the limitation laid down by s. 27 of Act VIII of 1869. *Gooroo Doss Roy* v. *Ram Narain Mitter* (2); *Nistarinee* v. *Kally Pershad Dass Chowdhry* (3); *Nilmadhub Shaha* v. *Srinibash Kurmokar* (5).

The decree of the District Judge will be set aside, and the case will go back to be heard in the lower Appellate Court on the merits.

Appeal allowed and case remanded.

(1) 25 W. R., 217. (2) B. L. R., Sup. Vol., 628: 7 W. R., 186.
(3) 21 W. R., 53. (4) 20 W. R., 455. (5) I. L. R., 7 Calc., 442.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Field.

1882
December 5.

GOBIND CHUNDER ADDYA (PLAINTIFF) *v.* AFZUL RABBANI AND ANOTHER (DEFENDANTS).*

Res judicata—Suit for rent dismissed for default—Subsequent suit for possession—Civil Procedure Code (Act X of 1877) ss. 13, 43, 102. 103.

In 1870 two plots of land, numbered 155 and 147, belonging to the same owner, were sold in execution of a decree. The purchaser of plot 155 sold it to *A*, who in 1873 sued the tenant of a portion of the land for rent. In this suit *A* prayed that it might be declared that he was the owner. The tenant alleged that *B*, the purchaser of plot 147, was the owner of the land in respect of which rent was sought to be recovered, and *B* was made a party to the suit. At the hearing *A* did not appear, and the suit was dismissed for default. Subsequently *A* sold plot 155 to the present plaintiff, who now sued for possession.

Held, that the suit was not barred as *res judicata*.

Per GARTH, C.J.—The operation of s 103 of the Code of Civil Procedure is confined to those cases only when a second suit is brought for the same object and cause of action as the suit which is dismissed.

THIS was a suit for possession of certain land together with mesne profits. It appeared that the land in question had originally belonged to one Abdool Hye. On the 25th of February 1870 this land, which was numbered 155, was sold in execution of a decree against one Abdool Hye, and was purchased by one J. S. Leslie. At the same sale another plot of land, also belonging to Abdool Hye, and numbered 147, was sold to one Syed Afzul Rabbani. On the 18th May 1870 Leslie sold the plot No. 155 to one W. W. Linton. In 1873 Linton instituted a suit against one F. W. Harper for the rent of plot 155; the plaint in that suit contained the following prayer: "The defendant refuses to admit that the plaintiff is entitled to the said premises or any part thereof. The plaintiff therefore prays that it be declared that the plaintiff is the owner of the said premises." As the defendant Harper repudiated Linton's title to receive rent, and

* Appeal from Appellate Decree No. 596 of 1881 against the decree of J. F. Browne, Esq., Officiating Judge of the 24-Pergunnahs, dated the 20th January 1881, affirming the decree of Baboo Krishna Mohun Mukerjee, Second Sub-Judge of that district, dated the 11th March 1880.

said that the rent of the land was payable to Afzul Rabbani, the Court made the latter a defendant. On the day fixed for the hearing of the suit the plaintiff did not appear, and the suit was dismissed under s. 114 of Act VIII of 1859 for default. On the 7th January 1879 lot No. 155 was purchased at a sale in execution of a decree against Linton by the present plaintiff Gobind Chunder Addya. The plaintiff now sued Afzul Rabbani and Harper for possession of the land, praying for possession of the land and for mesne profits against the first defendant, and for a decree directing the second defendant to pay rent to him.

The first defendant objected that the property in suit did not belong to lot No. 155 but to lot No. 147, and that the claim was barred under ss. 13 and 43 of Act X of 1877, and ss. 6 and 7 of Act XII of 1879.

Both the lower Courts held that the suit was barred. The plaintiff appealed to the High Court.

The Advocate General (*Offg.* Mr. *Phillips*) and Mr. *Bell* for the appellant.

Mr. *Braunfield* and Moonshi *Serajul Islam* for the respondents.

The following judgments were delivered by the Court (GARTH, C.J., and FIELD, J.)

GARTH, C.J.—The plaintiff sues in this case to recover a small piece of ground with the building upon it; and the suit has been dismissed in the Court below, upon the ground that the plaintiff is precluded by s. 103 of the Civil Procedure Code from bringing it.

It appears that the piece of land, which is the subject of the suit, belonged formerly, together with other land, to one Abdool Hye, and that two several portions of this land were sold under an execution against Abdool Hye on the same day; one portion, No. 155, was sold to a Mr. Linton; and another portion, No. 147, to Afzul Rabbani, the present defendant.

The plaintiff in this suit bought Mr. Linton's share at a sale in execution of a decree; and he claims the piece of land now in suit, as belonging to the portion numbered 155, which Mr. Linton purchased.

On the other hand, the defendant Afzul Rabbani claims it as

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part of the piece numbered 147, which he purchased; and he has set up as a defence to the plaintiff's claim a judgment in a former suit which was brought by Mr. Linton for the rent of No. 155 against a person named Harper. That suit was dismissed under s. 114 of Act VIII of 1859, (which corresponds to s. 103 of Act X of 1877) because Mr. Linton did not appear at the trial.

Now s. 103 says, that "when a suit is wholly or partially dismissed under s. 102," (that is, where the defendant appears, and the plaintiff does not appear) "the suit shall be dismissed; and the plaintiff shall be precluded from bringing a fresh suit *in respect of the same cause of action.*"

The defendant here says that the former suit was brought for the same cause of action as this suit, and that therefore the plaintiff is precluded from bringing it.

Both the Courts below have dismissed the suit upon that ground; and the plaintiff consequently appeals to us.

Now in order to determine whether those Courts were right, we must see what the nature of the former suit was.

It was a suit brought by Mr. Linton, the plaintiff's predecessor in title, against Mr. Harper, for the rent of the piece of land which is the subject of this suit. The defendant pleaded that the present defendant, Afzul Rabbani, was his landlord; and that the piece of ground belonged to Afzul Rabbani as being part of lot No. 147.

Upon this defence being set up, the Court considered Afzul Rabbani as the person really interested in the dispute, and directed him to be made an intervening defendant. Accordingly Afzul Rabbani intervened, for the purpose of supporting Mr. Harper's case, that the piece of land formed part of No. 147, and therefore was not Mr. Linton's property.

That suit was dismissed, because Mr. Linton did not appear at the trial; and in this case the Courts below have held, that as Afzul Rabbani was made an intervening defendant in the former suit for the purpose of having his title to this piece of ground decided as against Mr. Linton, the present plaintiff, who claims under Mr. Linton, is precluded by the result of that suit from trying this

suit against Afzul Rabbani; and it has been argued here that the former suit was not solely for rent, but it was also for a declaration of the plaintiff's title to the land in respect of which the rent was claimed.

We have ascertained what the real nature of the former suit was; and we find that it was not brought for possession of the land now in question, but merely to recover rent from Mr. Harper, though the plaintiff certainly asked for a declaration by the Court that he was entitled, *as against the defendant*, to the land of which the rent was claimed.

That being so, I am of opinion that the Courts below were wrong in deciding that Mr. Linton, (or rather the plaintiff in this suit who claims under Mr. Linton) is precluded from bringing this suit to try the title to the land as against the present defendant.

No doubt an issue was raised in the former suit as between Mr. Linton and the present defendant as to the title to the land; but the suit was not brought against Afzul Rabbani, nor was it brought to try the title to the land, or to obtain possession of it as against him. It was simply brought to recover rent, and to have Mr. Linton's title as landlord declared as against Mr. Harper as his tenant. The question of title to the land as between Mr. Linton and Afzul Rabbani was merely raised incidentally to the main question. The matter is clearly not *res judicata*; and I consider the operation of s. 103 of the Code of Civil Procedure is confined to those cases only, where a second suit is brought for the same object and cause of action as the suit which is dismissed.

Applying that principle to the present case, Mr. Linton, or those claiming under him, would no doubt be precluded from bringing a suit for the same rent which was sued for in the former suit; but he is not precluded from bringing a suit to try the title to the land as against the present defendant.

The judgments, therefore, of both the lower Courts must be set aside, and the case must go back to the first Court to be tried on its merits. The respondent must pay the costs of this appeal, and the costs in the lower Courts will abide the result of the cause.

FIELD, J.—I also think that this case should be remanded to be tried on the merits.

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The facts are very simple: Two lots, numbered respectively 155 and 147, originally belonged to Abdool Hye. These lots were sold in execution on the same day. Lot 155 was purchased by one Mr. Leslie, who sold to Mr. Linton, whose interest was again sold in execution and purchased by the plaintiff in the present case. Lot No. 147 was purchased by Afzul Rabbani, the defendant in the case now before us.

Mr. Harper is a tenant of a portion of the land, as to which there is now a dispute whether it constitutes part of lot No. 155 or lot No. 147. Mr. Linton, believing that it formed part of lot No. 155, sued Harper for rent, relying upon a covenant in the lease, under which Harper held, to pay rent to Abdool Hye and his *assigns*.

In answer to that suit, it was pleaded that the particular piece of land occupied by Mr. Harper was not part of lot No. 155, but was part of lot No. 147, and that the rent was therefore payable to Afzul Rabbani. It would appear that Abdool Hye, the former owner, had instructed Mr. Harper to pay his rent to Afzul Rabbani.

This being so, it became necessary, in order to decide the suit or rent, to try the question of title; in other words to try which plot of land contained the one bigha held by Mr. Harper.

The Court in which the rent suit was pending thought fit to make Afzul Rabbani a party to that case. Now this is a course the impropriety of which has been repeatedly pointed out by this Court. However, it was done, and an issue of title was raised, but when the case came on for hearing, Mr. Linton, the plaintiff, did not appear, and the case was dismissed under s. 114 of the old Code, Act VIII of 1859. It is now contended that the present suit, which is a suit brought to establish the plaintiff's title as against Mr. Harper and Afzul Rabbani is barred by the dismissal of the previous suit. This I think it clearly is not. It certainly is not barred by s. 13 of the Code of Civil Procedure, for the question of title was not heard and decided in that suit; and then as regards the express provision of s. 114 of Act VIII of 1859, which provides that a plaintiff whose suit has been dismissed for default shall be precluded from bringing a fresh suit in respect of the same cause of action, it appears to me that the cause of action in the previous suit was the non-payment of rent, and this is a

different cause of action from the cause of action in the present suit.

It is to be observed that the former suit was brought upon a Court-fee stamp assessed according to the value of the rent, and that there was no prayer for possession. It is clear, therefore, that no cause of action arising out of non-delivery of possession was alleged or put forward in the plaint; nevertheless, if the Court had tried the issue of title, the finding upon that issue must have had the effect of *res judicata* as between the parties, but inasmuch as that issue was not tried, the question raised thereby was not heard and decided, and therefore the matter is not *res judicata*, having regard to the express language of s. 13 of the Code. The cause of action in the present case is, to my mind, with reference to s. 114 of Act VIII of 1859, clearly distinguishable from the cause of action in the previous case; and the present suit is not therefore barred by the express provision contained in this section, which has moreover since been repealed.

Appeal allowed.

Before Sir Richard Garth, Knight, Chief Justice, and Mr Justice Field.

SARASWATI DASI AND OTHERS (DEFENDANTS) *v.* DHANPAT SINGH (PLAINTIFF).*

1882 *November* 27.

Evidence Act I of 1872, *s.* 35—*Land Registration Act* (*Beng. Act VII of* 1876), *s.* 55—*Entry in register, Effect of.*

Entries made under Beng. Act VII of 1876 by the Collector recording the names of proprietors of revenue-paying estates are not evidence under s. 35 of the Evidence Act of the fact of proprietorship. That section relates to the class of cases where a public officer has to enter in a register or other book, some actual fact which is known to him, *e g* the fact of a death or a marriage. The entry by the Collector in the register under Beng. Act VII of 1876 is not properly speaking the entry of a fact. It is a statement that the person is entitled to the property; it is the record of a right, not of a fact.

Per GARTH, C.J.—*Semble*, that s 55 of Beng. Act VII of 1876 constitutes

* Appeal from Appellate Decree No. 1954 of 1880, against the decree of A. J. R. Bainbridge, Esq., Judge of Moorshedabad, dated the 21st June 1880, affirming the decree of Baboo Menu Lall Chatterjee, Subordinate Judge of that district, dated the 30th December 1879.

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the Collector a competent Court under particular circumstances for determining as between two disputants the question of possession, and his recorded decision upon that question in the register might be evidence of the fact of possession as between those two parties.

Ram Bushan Makto v. *Jebli Mahto* (1), explained.

THIS was a suit for the possession of two mahals, numbered respectively 412 and 1333. The plaintiff alleged that the mahals in question originally belonged to one Asrafunnissa Begum; that she in the year 1861 mortgaged them to one Hulash Chand, who in 1864 foreclosed, and in 1877 sold them to him. It appeared that the mahal No. 412 was registered in the name of one Rudro Narain, and the mehal No. 1333 in the name of Hulash Chand.

The defendants alleged that Asrafunnissa Begum in 1851 sold her rights in the mahal No. 412 to one Nilmadhub Chowdhry; that Nilmadhub Chowdhry subsequently sold to Rudro Narain, who in 1852 registered himself as the proprietor; that in 1865 the mahal was sold to one Kristo Lall Pari, and in 1872 to one Lokenath Ghose, through whom the defendants derived title. They also alleged that the mahal No. 1333 was sold in 1858 by Asrafunnissa Begum to Rudro Narain, and in 1872 to Lokenath Ghose.

It appeared that the mahals were farmed from 1251 (1844) to 1260 (1853) to one Khudiram Pari. In 1262 (1855) they were let in patni to his representatives, of whom Rudro Narain was one. It also appeared that Hulash Chand, after he had foreclosed, had obtained decrees for the rent of the mahals, and that decrees in 1281 (1874), and 1283 (1876), were satisfied by the defendant Saraswati Dasi, the mother of the infant defendants, or her attorney.

The plaintiff proved his case. The defendants were unable to prove the conveyances by Asrafunnissa to Nilmadhub, or by Nilmadhub to Rudro Narain, but they contended that the fact that Rudro Narain's name was registered, was sufficient evidence to rebut the *primâ facie* case of the plaintiff.

Both the lower Courts decided in favour of the plaintiff.

The defendants appealed to the High Court.

(1) I. L. R., 8 Calc., 853.

Baboo *Chunder Madhub Ghose* for the appellants.

Baboo *Srinath Dass* for the respondent.

The judgment of the Court (GARTH, C.J., and FIELD, J.) was delivered by

GARTH, C.J.—I think there is no ground for this appeal.

The suit was brought by the plaintiff to have his name registered as the owner of two mahals, and he made out his title in this way:

Asrafunnissa was the original owner of the property, and the plaintiff's case was that Asrafunnissa mortgaged it to one Hulash Chand in 1861; that Hulash Chand foreclosed the mortgage in 1864; and that Hulash Chand then sold it to the plaintiff in 1877; and he has proved these facts to the satisfaction of the lower Court.

Then it is also admitted by both sides that one Khudiram farmed the property from 1251 to 1260; and that from the year 1262 it has been let in patni to the representatives of Khudiram, and it has been proved that Hulash Chand, under whom the plaintiff claims, sued the representatives of Khudiram for the patni rent and obtained a decree for the years 1281 and 1283, and, moreover, that the amount of that decree was paid by the present defendant or her attorney.

Now this of course is a strong *primâ facie* case made out by the plaintiff. But then it is contended by the learned pleader for the appellant, that the lower Appellate Court has not attached due weight to the case set up by the defendant.

The defendant's case was that one Nilmadhub Chowdhry purchased Asrafunnissa's rights in one of those mahals No. 412 in the year 1851; that he sold it to one Rudro Narain on the 30th of January 1852; and that Rudro Narain has since been registered as the proprietor.

It is undoubtedly admitted by both sides that for many years the registered proprietor of this mahal has been Rudro Narain; and the appellant's pleader contended that, although neither the sale certificate of 1251 to Nilmadhub Chowdhry, nor the sale from him to Rudro Narain was proved, the mere fact of Rudro Narain's name being registered as the owner of the property was sufficient

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evidence of title or possession, or both, to rebut the *primâ facie* case of the plaintiff. And whatever may have been the law previous to the Bengal Act of 1876, it is said that under that Act at any rate enquiries had to be made by the Collector before the registry was made, and that the registration, being the act of a public officer recording the result of those enquiries, would be some evidence of the fact recorded.

I think that the entries in the register can never be evidence of title nor even of possession, except under the circumstances which I shall presently mention.

Let us see how the registry is made under the Act of 1876.

Section 20 provides that until the new registers are prepared under that Act, the old existing registers are to be in force, and by s. 22 "the Board may order new registers to be prepared, whenever it thinks fit; and such registers are to be prepared from the registers existing at the time of the order, and from entries of subsequent changes in the intermediate registers, and from any other authentic information available to the Collector."

The new registers being prepared in this way, the learned pleader contends that the entries thus made by the Collector, recording the names of the proprietors of revenue-paying estates, are, under s. 35 of the Evidence Act, evidence of the fact of proprietorship. But it seems to me that s. 35 does not say or mean anything of the kind, and I think that it would be a very alarming thing, in the interests of justice, if it did.

That section says, that "any entry in a public or other official book, register or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in the performance of a duty specially enjoined by the law of the country in which such book, register, or record is kept, is itself a relevant fact."

Now I understand this section to relate to that class of cases where a public officer has to enter in a register or other book some actual fact, which is known to him; as, for instance, the fact of a death or a marriage.

But the entry by the Collector in the register under the Act of 1876, that any particular person is the proprietor of certain land,

is not properly speaking the entry of a fact. It is a statement that the person *is entitled to the property*; *it is the record of a right not of a fact*; and although for the purpose of making that entry the Collector is sometimes bound to enquire who is the party in possession, it often happens that he makes it without any such enquiry.

If the production of the register were *per se* evidence of what it records, that is to say, that such and such a person is the proprietor of certain property, there would never be any necessity, as it seems to me, to resort to other evidence of title. It would be quite unnecessary to prove or produce title deeds. The party who has to make out his case might keep back his title deeds if he has any, and content himself simply with producing an office copy of the register.

No authority has been cited in favour of that position, and speaking for myself I consider that to make such a use of s. 35 would be quite beside the proper object of the section.

I have said, however, that under certain circumstances I think that the register kept under the Act of 1876 might be evidence of possession. We made some observations to that effect in the case of *Ram Bushan Mahto* v. *Jebli Mahto* (1) which has been referred to by the pleader for the appellants, and I will now proceed to explain what we meant.

Section 55 of Act VII of 1876 provides for cases where there is a dispute between two persons, as to which is entitled to be registered, and the Collector has to ascertain which of those persons is in possession. The section runs thus: "If the applicant's possession of, succession to, or acquisition by transfer of the extent of interest in respect of which he has applied to be registered, is disputed by or on behalf of any person making a conflicting claim in respect thereof, and if the possession of the applicant in accordance with the application is not proved to the satisfaction of the Collector, the Collector shall determine, summarily, the right to possession in respect of the interest in dispute, and shall deliver possession accordingly, and shall make the necessary entry in the registers."

(1) I. L. R., 8 Calc., 853.

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Now that section, as it seems to me, constitutes the Collector a competent Court, under particular circumstances, for determining as between the two disputants, the question of possession; and his recorded decision upon that question in the register might, (I do not say it would) be evidence of the fact of possession as between those two parties; but this question does not arise here, and we are not called upon to determine it in the present case.

It is sufficient for our present purpose to say that, as the plaintiff here has made out a *primâ facie* case, the District Judge was right in holding that the defendant had not brought forward any available evidence to rebut it.

The appeal will, therefore, be dismissed with costs.

FIELD, J.—I also think that this appeal must be dismissed. Both parties admit that the two properties which form the subject of this litigation originally belonged to Asrafunnissa Begum. The plaintiff makes title in this way: He says that these two properties were mortgaged by Asrafunnissa Begum to one Hulash Chand under a mortgage deed, dated August 1861; that Hulash Chand foreclosed on 29th November 1864, and obtained possession of the properties; and that afterwards Hulash Chand, being in possession, and having a good title, sold them to him, the plaintiff.

This is a good title, and has been satisfactorily proved, and the question is, whether the defendants have proved a better title.

It seems to me that they have not. They also claim under Asrafunnissa. With respect to one property, numbered formerly 412, and recently, 2,855, they say that Asrafunnissa Begum's right, title and interest was sold in execution in the year 1851, and was then purchased by Nil Madhub Chowdhry. The sale certificate under which Nil Madhub Chowdhry is said to have purchased, has not been produced, and the first link in the chain of title set up by the defendant is therefore wanting.

Then it is said that Nil Madhub Chowdhry sold to one Rudra Narain on the 30th of January 1852. This conveyance also has not been produced, and its non-production has not been accounted for. But the learned pleader for the appellant has

contended that this want of direct proof of title is compensated by the fact of Rudra Narain having been registered in the old Collectorate register as the proprietor of the property. Assuming that an entry in the quinquennial register may be relevant to prove any fact which the law required to be stated in that register, I do not see how this will help the defendant, because, as a matter of fact, neither the original register, nor a copy of the entry, has been produced in the present case. The learned pleader for the appellant relies, however, upon the admission that Rudra Narain was registered; but I think that we cannot substitute this admission for the register, or a copy of the register, which if produced would show what fact or facts was or were stated therein. I am not aware that the old quinquennial register required the fact of possession to be inserted therein; and we cannot assume that the entry in the register contained any statement as to Rudro Narain's possession.

Then as to the value of any entry in the register kept antecedent to Beng. Act VII of 1876, I think that its value is not under any circumstances very great, and its value would be particularly small in the present case in which it is sought to substitute this piece of evidence for those documents of title which ought to be, but are not, forthcoming.

It is well known that one of the reasons which led to the enactment of Beng. Act VII of 1876 was that the quinquennial registers kept under the old Regulation contained no legal sanction, and contained no provision which compelled persons succeeding to property by inheritance or transfer to have their names registered. It constantly has happened in the course of my experience that the person registered as proprietor was a person who died half a century ago; and the very fact of these registers not being kept up to date, must very much diminish the value of any entry in them as evidence of the possession of any particular person at any particular time.

Under the provisions of the Beng. Act VII of 1876, there are several penalties attaching to non-registration, and there is, therefore, a much stronger presumption that the person whose name appears in the register kept under this Act is the person in

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possession of the property. The value of an entry in this register certainly of any new entry may, therefore, be different from that of an entry in the register kept under the old Regulation. But even with respect to the Act of 1876, the only question which the Collector is entitled to enquire into is that of possession. He has no jurisdiction to deal with the question of title, which is specially reserved for the decision of the ordinary Civil Courts.

I think that in a case like the present, in which the plaintiff has made out a good title by the production of those documents which he might have been expected to produce, and has also given evidence of possession, the mere fact of registration, which at best is only evidence of possession, cannot be taken to constitute a better title—a title, that is, which should overcome and prevail against the title proved by the plaintiff. Therefore, as regards the property numbered 412, there can be no doubt as to the correctness of the decision of the Court below.

Then as to the other property numbered 1333. I find that the Subordinate Judge says that it was conceded that the plaintiff's vendor was the recorded proprietor of the mahal bearing this number in the Collector's register, and this being so, he has, so far as regards registration, all the advantage that this can confer upon the defendants, while he has also proved a good title. He is, therefore, entitled to succeed as to this property also. Under these circumstances the appeal must fail, and be dismissed with costs.

Appeal dismissed.

PRIVY COUNCIL.

MISIR RAGHOBARDIAL (PLAINTIFF) *v* SHEO BAKSH SINGH (DEFENDANT)

P. C.*
1882
June 29.
July 15.

Res judicata—Civil Procedure Code, Act X of 1877, *s.* 13—*Competent Court.*

The decision of a Court, in order to be conclusive in another Court, must have been that of a Court which would have had jurisdiction to decide the question raised in the subsequent suit in which the decision is given in evidence as conclusive

The words "Court of competent jurisdiction," used in s. 13 of the Code of Civil Procedure, include the meaning that the first Court must not have been precluded by the pecuniary limit of its jurisdiction from deciding the question raised in the other. The two Courts must exercise such concurrent jurisdiction in regard to the pecuniary limit of their powers that the subject-matter of the second suit would not have been beyond the powers of the Court which disposed of the prior one.

The defence made to a suit on a bond for Rs 12,000 and interest thereon, in a Court having no pecuniary limit of jurisdiction, was that in a prior suit for Rs 1,665, balance of interest, brought in a Court with power to try suits not exceeding Rs. 5,000 in value, the principal sum due on that bond had been decided to be Rs. 4,790.

Held, that the issue as to the amount of principal due on the bond had not been heard, and finally decided by a Court of competent jurisdiction within the meaning of s. 13.

APPEAL from a decree of the Judicial Commissioner of Oudh (22nd November 1879,) dismissing an appeal from a decree of the Deputy Commissioner of Sitapore (25th February 1879.)

This was a question of the application of s. 13 of the Code of Civil Procedure, Act X of 1877; it being alleged that the matter directly and substantially in issue in the suit had been similarly in issue in a former suit between the same parties, and had therein been heard and finally decided by a Court of competent jurisdiction.

The Courts, to the decisions whereof this case related, were constituted under the Oudh Civil Courts' Act (XXXII of 1871);

* *Present*: SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH, and SIR A. HOBHOUSE.

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establishing, as Courts of first instance, the following, *viz.*: The Court of the tehsildar, (with power to try suits up to Rs. 100 in value, extendible to Rs. 500); the Court of the Assistant Commissioner, or Extra Assistant Commissioner, (with powers up to Rs. 1,000, extendible to Rs. 5,000); and the Court of the Deputy Commissioner of the District, or in Lucknow, the Civil Judge, (without pecuniary limit of jurisdiction).

The two suits to which this appeal referred related to a bond for Rs. 12,000 for money lent, with interest at 1-8 per cent., alleged to have been executed by the defendant on the 21st November 1875. The first was brought by the present appellant on the 7th December 1877, in the Court of an Assistant Commissioner for interest due on the balance of an interest account, Rs. 1,665, giving credit for interest paid Rs. 2,475.

For the defence it was alleged that the payment of this latter sum not having been made for interest only, but in part for principal, should have been so credited; and that the principal due or sum originally lent, having been only Rs. 4,192, the credits more than balanced the account.

The Assistant Commissioner, erroneously considering that the pecuniary limit of his jurisdiction, *viz.*, Rs. 5,000, prevented his taking cognizance of the suit, (as a question of the actual amount of debt secured by a bond for Rs. 12,000 was raised), on remand from the Commissioner, on this preliminary point, the suit was heard and decided by Extra Assistant Commissioner. An issue as to the amount of the principal due having been fixed, the suit was dismissed, on its appearing that the amount admitted to have been paid, *viz.*, Rs. 2,475, the original debt having been only Rs. 4,192, more than covered the claim.

Pending an appeal to the Commissioner, who afterwards heard and dismissed an appeal from the abovementioned decree, the period of three years fixed in the bond for the re-payment of the principal expired; and the present appellant, on the 7th December 1878, brought the suit out of which this appeal arose, for principal Rs. 12,000 and interest Rs. 2,435, due on the bond of 1875. The Deputy Commissioner of Sitapore, before whom this suit was brought, gave judgment for the balance of Rs. 4,790, and interest thereon, holding the claim for Rs. 12,000,

principal, to be barred under s. 13 of the Code of Civil Procedure with reference to the above mentioned suit for interest. He was of opinion that the matter of the consideration given for the bond of 1875 had been directly and substantially in issue in the first suit, and that it had, accordingly, been heard and finally decided by a Court of competent jurisdiction.

An appeal, lying to the Commissioner, (the same officer who at that time had heard the appeal in the other suit,) was transferred to the Judicial Commissioner by whom it was dismissed on the ground that s. 13 had been rightly applied.

On this appeal

Mr. *J. F. Leith, Q.C.,* and Mr. *C. W. Arathoon,* appeared for the appellant.

The respondent did not appear.

For the appellant it was argued that the determination by the Extra Assistant Commissioner of a question incidental to the decision of the suit in his Court, in other words, the decision by him as to the original debt really due between the parties to the bond, with a view to determining the question of the amount of interest due, did not render s. 13 applicable to the suit before the Deputy Commissioner. The decisions on the former enactment, s. 2 of Act VIII of 1859, were referred to; and the requirement of s. 13 that the decision, in order to be conclusive, must be that of a Court of competent jurisdiction, was insisted upon. The Extra Assistant Commissioner, exercising powers only up to Rs. 5,000, was not a Court competent to finally decide upon a claim of Rs 14,435. Reference was made to *Sukeemonee Debia* v. *Hureemohun Mookerjee* (1); *Mussamut Edun* v. *Mussamut Bechun* (2); *Anantha Narayan Appaiyan* v. *Ganapati Aiyan* (3); *Aradhun Dey* v. *Golam Hossein* (4); *Mahima Chandra Chuckerbutty* v. *Rajkumar Chuckerbutty* (5); *Duchess of Kingston's case and notes thereto* (6);

(1) 6 W R, Civ. Ref, 6.
(2) 8 W. R, 175.
(3) 2 Mad H. C. Rep., 469.
(4) 8 W R., 487.
(5) 1 B. L R A. C. 1: S C. 10 W R, 22.
(6) 2 Smith's L. C., 778.

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Barrs v. *Jackson* (1); *Chunder Coomar Mundal* v. *Nunnee Khanum* (2); *Khugowlee Singh* v. *Hossein Bux Khan* (3).

On a subsequent day, their Lordships' judgment was delivered by SIR R. COUCH.—The suit, which is the subject of this appeal, was brought upon a bond, dated the 21st of November 1875 given by the respondent for Rs. 12,000, stated therein to have been borrowed from the appellant, the principal to be repaid within three years, and interest to be paid monthly at the rate of Rs. 1-8 per cent. per month. The three years having expired, the plaint was filed on the 7th of December 1878 in the Court of the Deputy Commissioner of Sitapur. The defendant (the now respondent) pleaded "want of full consideration, and that in a previous suit for Rs. 1,665, interest on this bond, the issue regarding consideration was decided in favour of defendant, the Court deciding that defendant had received only Rs. 4,790 and not Rs. 12,000," which decision was upheld on appeal. Upon this a preliminary issue was framed by the Court as follows: "Is the issue regarding consideration a *res judicata* (s. 13, Act X of 1877) between the parties?" The decision of the Deputy Commissioner upon this issue was in favour of the defendant, and judgment was given for the balance found to be due of the principal sum of Rs. 4,790 and the interest thereon. From this decree there was an appeal by the plaintiff to the Judicial Commissioner of Oudh, who dismissed it, and the plaintiff has appealed to Her Majesty in Council from that dismissal.

The suit for interest was brought in December 1877, in the Court of the Assistant Commissioner of Sitapur, it being alleged that Rs. 4,140 was due for interest on a bond for Rs. 12,000, and it being admitted that the defendant had paid Rs. 2,475, the balance of Rs. 1,665 was claimed. The jurisdiction of the Assistant Commissioner was limited to suits where the amount or value of the subject-matter did not exceed Rs. 5,000, and the defendant objected that, if the plaintiff insisted on the validity of the bond, the case could not be tried before him. The Assistant Commissioner held that the case was beyond his jurisdiction, but

(1) 1 Phillips' Ch., 582.
(2) 11 B. L. R., 434.
(3) 7 B. L. R., 673.

upon an appeal to the Commissioner, his order dismissing the suit was cancelled, and it was remanded for trial on the merits. The case was then tried by the Extra Assistant Commissioner, and evidence having been given on both sides, he found that the principal sum due on the bond was Rs. 4,790, and that the plaintiff was entitled to interest thereon, and the plaintiff having admitted the receipt of Rs. 2,475 on account of interest, which exceeded the sum he found to be due for interest by Rs. 822-7-9, he dismissed the suit. An appeal from this decision to the Commissioner was dismissed, and an application made to the Judicial Commissioner to allow an appeal from that order was rejected by him.

The question now before their Lordships depends upon the construction of s. 13 of Act X of 1877. Before considering that question, it will be well to refer to the state of the law in India when that Act was passed. Section 2 of Act VIII of 1859, the Code of Civil Procedure for which Act X of 1877 was substituted, provided that the Civil Courts should not take cognizance of any suit brought on a cause of action which should have been heard and determined by a Court of competent jurisdiction in a former suit between the same parties or between parties under whom they claim. It is clear that this section would not have applied to the present case, the cause of action in the two suits—the non-payment of interest in one and the non-payment of principal in the other—being different. In fact, when the first suit was brought, the cause of action in the second had not arisen. But independently of this provision in the Code of Procedure, the Courts in India have adopted the rule laid down in the *Duchess of Kingston's case*, and have applied it in a great number of cases. It was recognized as the law in India by this Board in *Khugowlee Sing* v. *Hossein Bux Khan* (1), where, after quoting the passage in the *Duchess of Kingston's case*, in which the rule is stated, their Lordships say: "There is nothing technical or peculiar to the law of England in the rule as so stated. It was recognised by the civil law, and it is perfectly consistent with the second section of the Code of Procedure, under which this case was tried."

(1) 7 B. L. R., 673.

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Mussamut Edun v. *Mussamut Bechun* (1) may be referred to as the leading case on this subject. In that case the Chief Justice, Sir Barnes Peacock, held that the two Courts must be Courts of concurrent jurisdiction, and "in order to make the decision of one Court final and conclusive in another Court, it must be a decision of a Court which would have had jurisdiction over the matter in the subsequent suit in which the first decision is given in evidence as conclusive." As to what is a Court of concurrent jurisdiction, it is material to notice that there is in India a great number of Courts; that one main feature in the Acts constituting them is that they are of various grades with different pecuniary limits of jurisdiction; and that by the Code of Procedure a suit must be instituted in the Court of the lowest grade competent to try it. For instance, in Bengal, by the Bengal Civil Courts Act, No. VI of 1871, the jurisdiction of a Munsiff extends only to original suits in which the amount or value of the subject-matter in dispute does not exceed Rs. 1,000. The qualifications of a Munsiff and the authority of his judgment would not be the same as those of a District or of a Subordinate Judge, who have jurisdiction in civil suits without any limit of amount. In their Lordships' opinion it would not be proper that the decision of a Munsiff upon (for instance) the validity of a will, or of an adoption, in a suit for a small portion of the property affected by it, should be conclusive in a suit before a District Judge or in the High Court, for property of a large amount, the title to which might depend upon the will or the adoption. Other similar cases are mentioned in the judgment of the Chief Justice. It is true that there is an appeal from the Munsiff's decision, but that upon the facts would be to the District Court and not to the High Court. And that the decision should be conclusive would be still more improper as regards many other of the various Courts in India, the qualifications of whose Judges differ greatly. By taking concurrent jurisdiction to mean concurrent as regards the pecuniary limit as well as the subject-matter, this evil or inconvenience is avoided; and although it may be desirable to put an end to litigation, the inefficiency of many of the Indian Courts makes it advisable not to be too stringent in preventing a litigant from proving the truth of his

(1) 8 W. R., 175.

case. It appears to their Lordships that if this case had arisen before the passing of Act X of 1877, the High Courts in India would have rightly held that the decision of the Extra Assistant Commissioner in the first suit was not conclusive as to the amount of the principal sum due on the bond.

Section 13 of Act X of 1877 is as follows: "No Court shall try any suit or issue in which the matter directly and substantially in issue has been heard and finally decided by a Court of competent jurisdiction, in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title."

The intention seems to have been to embody in the Code of Procedure, by ss. 12 and 13, the law then in force in India, instead of the imperfect provision in s. 2 of Act VIII of 1859. And as the words of the section do not clearly show an intention to alter the law, their Lordships do not think it right to put a construction upon them which would cause an alteration.

The first suit was for Rs. 1,665, for interest only, the principal not being then due, and the matter in issue was whether that sum was due. The plaintiff alleged that it was for interest on a bond for Rs. 12,000, which the defendant denied, and thus an issue was raised as to the consideration for the bond, but this was a collateral rather than a direct issue in the suit. The plaintiff might have succeeded without having a finding upon it if he had proved an admission by the defendant that the sum claimed was due for interest, or had shown that the Rs. 2,475 had been expressly paid on account of the larger sum which he said the defendant owed for interest. If the decision of the Assistant Commissioner is conclusive he will, although he could not have tried the question in a suit on the bond, have bound the plaintiff as effectually as if he had jurisdiction to try that suit. Their Lordships think this was not intended, and that by Court of competent jurisdiction Act X of 1877 means a Court which has jurisdiction over the matter in the subsequent suit in which the decision is used as conclusive, or in other words, a Court of concurrent jurisdiction. In the judgment delivered by this Board in *Khugowlee Sing* v. *Hossein Bux Khan* (1) it said that the *eadem*

(1) 7 R. L. R., 673, at p. 680.

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causa petendi and judgment of a Court of competent or concurrent jurisdiction were both wanting in that case. This seems to show what was considered to be a competent Court. Their Lordships think that s. 13 of Act X of 1877 should be so construed, and consequently they will humbly advise Her Majesty that the orders of both the lower Courts should be reversed, and the suit be remanded for trial on the merits. The respondent will pay the costs of this appeal.

Appeal allowed.

Solicitor for appellant: Mr. *T. L. Wilson.*

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Norris.

1882. *July 3.*

BEHARY LALL AND ANOTHER (JUDGMENT-DEBTORS) *v.* GOBERDHUN LALL (DECREE-HOLDER) *

Execution of decree—Limitation applicable to execution of a decree passed previous to the 1st October 1877—Limitation Acts (IX of 1871, Art. 167, and XV of 1877, Art. 179)—General Clauses Consolidation Act (I of 1868,) s. 6, Effect of.

In execution of a decree, dated the 17th January 1877, the judgment-creditor applied on the 13th May 1878 to have the property of his judgment-debtor sold on the 16th September 1878. Subsequently on the 2nd June 1881 he made a further application to have the decree executed.

Held, that the case was governed by the provisions of Art. 167 of Act IX of 1871, and not by those of Art. 179 of Act XV of 1877, and that as the application had not been made within any one of the periods given in the third column of Art 167 it was barred by limitation.

Held, also, following *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (1), that although there is no corresponding provision in Act XV of 1877 to that contained in s. 1 of Act IX of 1871 all applications for execution of a decree are applications in the suit which resulted in that decree.

Held, further, that under s. 6 of Act I of 1868 the repeal of Act IX of 1871 by Act XV of 1877 does not affect any proceedings commenced before the repealing Act came into force.

Re Ratansi Kalianji (2) followed.

* Appeal from Original Order No 60 of 1882, against the decree of Baboo Mohendro Nath Bose, Subordinate Judge of Mozufferpore, dated the 17th of December 1881.

(1) I. L. R., 8 Calc., 51. (2) I. L. R., 2 Bom., 143.

THIS was an application made on the 2nd June 1881 for execution of a decree, bearing date the 17th January 1877. On the 13th May 1878 the decree-holder had made an application to the Court for the purpose of bringing the property of the judgment-debtors to sale under the decree on the 16th September 1878, and on the hearing of the present application it was urged on his behalf that the provisions of Art. 179 of Act XV of 1877 applied; and that as the present application had been made within three years from the latter date, he was entitled to have the decree executed.

The lower Court adopted this view, and, after disallowing the objection of the judgment-debtors, granted the order prayed for.

The judgment-debtors accordingly preferred this appeal against that order.

Baboo *Jogesh Chunder Roy* appeared on behalf of the appellants.

Baboo *Obinash Chunder Banerjee* for the respondent.

The judgment of the Court (MITTER and NORRIS, JJ.) was delivered by

MITTER, J.—The question in this case is whether the decree obtained by the respondent against the appellants on the 17th January 1877 is barred by limitation. The lower Court has held that it is not barred, because an application had been made by the decree-holder within three years from the present application in order to bring certain property of the judgment-debtors to sale in execution. In its opinion the present case is governed by Article 179 of the present Limitation Act, *viz.*, Act XV of 1877. The words of Article 179, which, in the opinion of the lower Court, save the decree from being barred, are as follows: "The date of applying in accordance with law to the proper Court to take some step in aid of execution of the decree or order." The lower Court was of opinion that an application for the sale of a judgment-debtor's property is one that comes within these words.

In the corresponding article of the Limitation Act of 1871, *viz.*, Article 167, these words are not to be found. The appellants

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contend that the lower Court is in error in deciding the question of limitation according to the provisions of the new Limitation Act. It should have decided it with reference to Article 167 of the Limitation Act of 1871, inasmuch as the decree, which is sought to be executed, was passed when that Act was in force.

The present application for execution was made to the lower Court on the 2nd June 1881, and the present Limitation Act came into force on the first day of October 1877. The question we have to decide is, whether this application is governed by the Limitation Act of 1877 or of 1871. It is contended on behalf of the appellants that this application must be considered to have been made in the suit which resulted in the decree of the 17th January 1877; and that the aforesaid decree not being yet satisfied, the application was made in a proceeding which was pending on the date when the new Act came into operation; and that, therefore, under s. 6, Act I of 1868, the new Act cannot affect the application in question which was made in a pending proceeding. In support of this contention the learned pleader for the appellants has cited before us the decision of the Judicial Committee of the Privy Council in *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (1). In that case the decree was passed when Act XIV of 1859 was in force, but the application for execution was made after the Limitation Act of 1871 had come into operation. The question for decision was, whether the application for execution was governed by the Act of 1859 or that of 1871. Their Lordships held that it was not governed by the Act of 1871. "The Act," their Lordships said, "was to come into force on the 1st of July 1871, but it was enacted by s. 1 that nothing contained in s. 2 or in Part II should apply to suits instituted before the 1st of April 1873. It appears to their Lordships that a thing which applies to an application in a suit applies to the suit, and that an application for the execution of a decree is an application in the suit in which the decree was obtained, and that as regards suits instituted before the 1st of April 1873 all applications in it are excluded from the operation of the Act."

There is no provision in the Act of 1877 corresponding to that of s. 1 of the Act of 1871, referred to above by their Lordships

(1) I. L. R., 8 Calc., 51

of the Judicial Committee. But they hold that all applications for execution of a decree are applications in the suit which resulted in that decree: therefore the application for execution in this case must be considered to have been made in a proceeding which commenced before Act XV of 1877 came into operation. It is true that the Limitation Act of 1871 was repealed by the Act of 1877, but this repeal under s. 6 of Act I of 1868 cannot affect any proceedings commenced before the repealing Act came into operation, there being nothing in the subject or context of the repealing Act repugnant to this provision.

It may be said that the subject of the Act in question is such that it precludes the operation of s. 6 of Act I of 1868; that a Limitation Act is an Act of procedure relating to suits; and that Acts relating to procedure, from the nature of their subject, apply to all pending proceedings from the date when they came into operation.

This question has been fully discussed by Westropp, C.J., in *Ratansi Kalianji* (1). After an elaborate discussion of the cases bearing upon the point he came to the conclusion that the rule in question is confined only to the procedure in Courts of Justice, no way prejudicing any of the parties to the suit.

The present application is, therefore, governed by Art. 167 of the Limitation Act of 1871, and as it was not made within any one of the periods given in the third column of that article, it is barred by limitation. We, therefore, reverse the judgment of the lower Court, and decree this appeal with costs.

Appeal allowed.

(1) I. L. R., 2 Bom., 148.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Mitter.

1882 December 14.

KOONJO BEHARY ROY (PLAINTIFF) v. POORNO CHUNDER CHATTERJEE (DEFENDANT).*

Parties—Principal and Agent—Plaintiff—Gomashta—Beng. Act VIII of 1869, s. 32.

Under s. 32 of Beng. Act VIII of 1869 a gomashta has no right to bring a suit in his own name. He can only sue in the name of his employer, and conduct the suit for him like any other agent.

THE facts of this case sufficiently appear from the judgment of

FIELD, J.—There are two points taken in this appeal, and I think the appellant must succeed upon both. The first point is that Koonjo Behary Roy as gomashta had no right to sue making himself plaintiff, even although it is stated in the plaint that he was suing on behalf of his employer Raj Kisto Mookerjee. In other words it is contended that the name of Baboo Raj Kisto Mookerjee must appear in the plaint as plaintiff, although the gomashta Koonjo Behary Roy may do everything in the suit that a recognized agent may do, regard being had to the provisions of s. 32 of Act VIII of 1869. Now all that s. 32 provides is that "every naib or gomashta thereto specially authorized by any writing under the hand of his employer shall, for the purposes of all suits, &c., be deemed to be the recognized agent of such employer within the meaning of s. 17 of Act VIII of 1859." Section 37 of the present Code corresponds with s. 17 of Act VIII of 1859. Now, it is quite clear that although, under the provisions of s. 36 of the Civil Procedure Code, any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party to a suit, may be made or done by his recognized agent, still it is clear that a recognized agent has no authority to constitute himself the plaintiff and bring the suit in his own name as plaintiff. Section 51 requires that the plaint shall be signed by the

* Appeal under s. 15 of the Letters Patent against the decree of Mr Justice Field, dated the 28th June 1882, in appeal from Appellate Decree No. 792 of 1881.

plaintiff and his pleader. In the present case the plaint is not signed by Raj Kisto Mookerjee, but it is signed by Koonjo Behary Roy only. It is clear, therefore, that Koonjo Behary Roy, although he sets out in the plaint that he acts for his employer, was the real plaintiff. It is to be observed that the provisions of s. 69 of Act X of 1859 were different from the provisions of s. 32 of Beng. Act VIII of 1869, the former provisions appearing to contemplate the institution or defending of suits by naibs, gomashtas, &c., in the name and on behalf of their employers. In Beng. Act VIII of 1869 there is one section which allows agents of a certain class to bring suits in their own name, that is s. 24, which provides for all suits which under the provisions of this section may be brought by or against zemindars, or other persons in the receipt of the rent of land, being brought by or against surbarakars or tehsildars of estates held under khas management. It is clear from the distinction in language between this section and s. 32 that the latter section does not contemplate that a naib or gomashta should bring a suit in his own name. All that the section permits him to do is to do anything that a recognized agent may do under the provisions of the Code of Civil Procedure, and it has already been pointed out that a recognized agent is not competent to bring a suit in his own name.

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The plaintiff appealed under s. 15 of the Letters Patent.

Baboo *Taruck Nauth Sen* for the appellant.

Baboo *Bipro Doss Mookerjee* and Baboo *Grija Sunker Mozoomdar* for the respondent.

The judgment of the Court (GARTH, C.J., and MITTER, J.) was delivered by

GARTH, C.J.—We think that the learned Judge is quite right.

Under s. 32 of the Rent Law a gomashta has no right to bring a suit in his own name. He can only sue in the name of his employer, and conduct the suit for him like any other agent.

It has been contended, indeed, that he did bring this suit as

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agent, and that the plaint should be read in that sense; but it is difficult so to construe the language, and when we look at the verification of the plaint, it is clear that the gomashta describes himself, and not his employer, as the real plaintiff.

This appeal must, therefore, be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Mitter and Mr. Justice Norris.

1882 *November* 23.

RAMDUT SING (DEFENDANT) *v.* MAHENDER PRASAD AND OTHERS (PLAINTIFFS.)*

Hindu Law—Joint Family—Mitakshara—Decree against the father of a joint family for lawful debts—Sale of the whole joint estate in execution of decree against one co-sharer.

A, a judgment-creditor, having obtained a decree against *B*, the father of a joint Hindu family governed by the Mitakshara law, in a suit to which the sons of *B* were not parties, but in which it was proved that the debt had been incurred for lawful purposes, proceeded to execute his decree by attaching and selling the joint family property. Thereupon the sons came in and objected to their interest in the property being sold in execution of a decree in a suit to which they were not parties, and, on their objection being disallowed, filed a suit against *A* and *B* to have it declared that their interest in the property was not liable to be sold to satisfy the decree.

Held, that the debt in respect of which the decree had been passed having been contracted for lawful purposes, the judgment-creditor was entitled to execute his decree against the whole of the joint family property.

Held, also, that the ruling in the case of *Deendyal Lal* v. *Jugdeep Narain Singh* (1) had no application to the facts of this case.

THIS was a suit brought by the sons against the father of a joint Hindu family governed by the Mitakshara law, and a person named Ramdut Sing, who had obtained a decree against the father in a suit upon a bond.

* Appeal from Appellate Decree No. 1624 of 1881 against the decree of J. F. Stevens, Esq., Officiating Judge of Sarun, dated the 27th June 1881, modifying the decree of Baboo Ramyad Lal, Munsiff of Sewan, dated the 31st March 1881.

(1) I. L. R. 3 Calc., 198.

Ramdut Sing had, on the 30th June 1867, advanced to Ram Narain Lal (the father) certain monies upon the security of a bond to enable him to pay off a decree then outstanding in the hands of one Thakur Ram Sing. Subsequently Ramdut Sing brought a suit upon the bond against Ram Narain Lal and obtained a decree, and in execution thereof he proceeded to attach and sell the joint family property belonging to Ram Narain Lal and his sons, the present plaintiffs. In these execution proceedings the plaintiffs came in and objected to the sale of the entire family property, but their objection was disallowed by the Court executing the decree. Thereupon they instituted the present suit against Ramdut Sing and Ram Narain Lal, and sought to have it declared that they were entitled to joint possession of the lands in question after excluding their father's share, which they alleged was alone liable to be sold in execution of the decree against him, and they also prayed for the cancellation of the order in the execution proceedings by which their share also in the property was ordered to be sold.

The first Court found as a fact that the money advanced by Ramdut Sing upon the bond was advanced for and spent on lawful objects, as it had been obtained by Ram Narain Lal for the purpose of paying off a decree then outstanding against him in respect of a debt incurred by him to defray the marriage expenses of his sons. The Court accordingly dismissed the suit, on the ground that the plaintiffs were liable for their father's lawful debt, and held that the suit had been brought by the plaintiffs in collusion with their father in order to deprive the creditor of the means of satisfying his decree.

On appeal the lower Appellate Court held that the case was governed by the decision in *Deendyal Lal* v. *Jugdeep Narain Sing* (1), and that the sons, not having been joined as party defendants in the suit against their father, all that the judgment-creditor could attach, or was entitled to sell under his decree, was the right, title and interest of the father in the joint family property. It accordingly modified the decree of the lower Court by setting aside the order in the execution proceedings, disallowing the plaintiff's objection, and declared that nothing but

(1) I. L. R. 3 Calc., 198.

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the right, title, and interest of the judgment-debtor Ram Narain Lal was liable to sale in execution of the decree against him. The claim for confirmation of possession over a specified portion of the joint family property after excluding the share of Ram Narain Lal was disallowed. Against this decree the defendant Ramdut Sing preferred a special appeal to the High Court.

Baboo *Hury Mohun Chuckerbutty* appeared for the appellant.

Baboo *Nil Madhub Bose* for the respondents.

The judgment of the Court (MITTER and NORRIS, JJ.) was delivered by

MITTER, J.—In this case the District Judge has reversed the decree of the Court of first instance, wholly relying upon the Privy Council ruling in the case of *Deendyal Lal* v. *Jugdeep Narain Sing* (1). It appears to us that this ruling has no application to the facts of this case. Here the creditor, the appellant before us, sued the father of a joint Mitakshara family upon a bond executed by him, obtained a decree, and in execution of that decree attached the family property. Thereupon the sons intervened and objected to the sale of the entire family property; their objection was disallowed by the execution Court. Thereupon, before the sale was brought about, the present suit was brought by the plaintiffs, the sons, to obtain a declaration that their interest in the family property is not liable to be taken in execution of the decree against the father. The Court of first instance held that it was not proved that the bond debt was contracted for immoral purposes; on the other hand the finding is that it was contracted for the purpose of defraying the expenses of the marriage ceremonies of some of the plaintiffs. Upon that finding of fact the lower Court dismissed the suit, and so far as that finding is concerned, it has not been set aside by the lower Appellate Court, but the lower Appellate Court thinks that upon the facts found the ruling in the case of *Deendyal Lal* applies. It is quite clear that the decision of the lower Appellate Court is erroneous; the ruling in *Deendyal Lal's* case only applies where the father's interest alone is sold in execution of decree. In this case the plaintiffs, the sons, are seeking to establish the non-

(1) I. L. R., 3 Calc., 198.

liability of their interest in the family property to sale in execution of a decree against the father, and they must make out that the debt which was the basis of the decree was contracted for immoral purposes. As upon that point the finding of the Court of first instance is against them, and that finding has not been set aside by the lower Appellate Court, it appears to us that the suit was rightly dismissed by the first Court. We accordingly reverse the decree of the lower Appellate Court, and restore that of the Court of first instance with costs in all the Courts.

Appeal allowed.

APPELLATE CRIMINAL.

Before Mr. Justice Mitter and Mr. Justice Field.

ROGHUNI SINGH AND OTHERS *v.* THE EMPRESS.*

1882 *September* 22.

Criminal Procedure Code (Act X of 1872) ss. 119, 323—Evidence—Statements of witnesses to a Police Officer during an investigation—Refreshing memory—Medical witnesses, Evidence of—Opinion of experts how elicited—Examining at Sessions trial medical witness who has been examined before the Magistrate—Post-mortem examination reports.

In giving evidence a police officer may refresh his memory by referring to documents in which he has under s. 119 of Act X of 1872 reduced into writing statements of persons examined by him during an investigation, but the documents themselves cannot be used as evidence, and a Judge should not read such documents to a jury in order to point out discrepancies between the evidence and previous statements of the witnesses.

The evidence of a medical man who has seen, and has made a *post-mortem* examination of the corpse of the person touching whose death the inquiry is, is admissible, firstly, to prove the nature of injuries which he observed; and, secondly, as evidence of the opinion of an expert as to the manner in which those injuries were inflicted, and as to the cause of death.

A medical man who has not seen the corpse is only in a position to give evidence of his opinion as an expert. The proper mode of eliciting such evidence is to put to the witness hypothetically the facts which the evidence of the other witnesses attempts to prove, and to ask the witness's

* Criminal Appeal No. 508 of 1882 against the sentence of H. Beveridge, Esq., Sessions Judge of Patna, dated the 25th August 1882.

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opinion on those facts. Section 323 of Act X of 1872 does not in any way preclude the Judge at a Sessions trial from calling and examining the medical witness who has been examined before the Magistrate, and in every case in which the deposition taken by the Magistrate is essentially deficient or requires further elucidation, such witness should be called and examined by the Sessions Judge.

A medical man in giving evidence may refresh his memory by referring to a report which he has made of his *post-mortem* examination, but the report itself cannot be treated as evidence, and no facts can be taken therefrom.

THE facts of the case are stated in the judgment of the High Court.

Mr. *Branson*, Mr. *M. M. Ghose*, and Baboo *Umakali Mookerjee* for the prisoners.

The *Deputy Legal Remembrancer* (Mr. *Kilby*) for the Crown.

The judgment of the Court (MITTER and FIELD, JJ.) was delivered by

FIELD, J.—This is an appeal from a sentence passed by the Sessions Judge of Patna upon three persons, Roghuni Singh, Ram Charan Singh, and Kanya Singh, who have been convicted, the first mentioned of murder, and the other two of abetment of murder, and have all three been sentenced to transportation for life. Two other persons, namely, Ram Lall and Bhoran, were tried, together with the appellants before us, and were acquitted by the unanimous verdict of the jury.

The prisoners, appellants, have been convicted by a majority of three out of five jurors.

It appears that the jury retired for eight minutes only, and in this case I desire to observe that this time was insufficient to enable the jury to consider the evidence, and deliberate thereupon amongst themselves.

The facts of the case for the prosecution are briefly these: Two persons, Radha Singh and Mewa Singh, were said to have taken a lease of some 10 bighas 13 cottahs of land from one Lakhon Mahton, ijaradar. On the morning of Monday, the 24th July 1882, these two persons, Radha Singh and Mewa Singh, went to a portion of the land consisting of some 10 cottahs, taking

with them three labourers, namely, Sukun, Gania and Badhan Mahton, for the purpose of transplanting paddy plants. There can be no doubt that between Radha and Mewa on the one side, and Ram Lall on the other side, there had been previous litigation and dissension. The story of the prosecution is that about mid-day Ram Lall and Bhoran came and ordered Radha Singh and Mewa Singh and their workmen to desist, and then went off, giving orders to the prisoners Roghuni Singh, Ram Charan Singh, Kanya Singh and others to beat Radha Singh and Mewa Singh, and their people, if they did not desist. There is no suggestion that Ram Lall and Bhoran were on the spot when the subsequent occurrence took place. It is then said that Gania and Sukun desisted from work, but that Badhan Mahton still went on working, whereupon Roghuni Singh, Ram Charan Singh and Kanya Singh came over, and Roghuni Singh struck Badhan on the head with a *lati*. Ram Charan Singh then struck him on the side of the temple, and Kanya Singh struck him on the side. There can be no doubt that Badhan Mahton died from congestion of the brain in consequence of having been struck on the head with some hard substance.

Now the case for the prosecution is that this hard substance was a *lati*, and that this *lati* was in the hands of the prisoner Roghuni Singh. The case for the defence on the other hand is, that the injuries to Badhan's head were not, and could not have been, inflicted by a *lati*, but that they were inflicted by a wooden instrument called an Arhan, and that Radha Singh himself had struck Badhan Mahton with this wooden instrument while aiming a blow at one of the opposite party, which missed him, and came down on the head of Badhan Mahton who was sitting down working transplanting the paddy plants. No witnesses were called in the Court of Session to prove the case set up by the defence, and we have to consider only the evidence for the prosecution, and the manner in which that evidence has been dealt with by the Sessions Judge.

It is to be observed, however, that the prisoners, in their statements before the Court of Session, alleged that they seized Radha Singh, and took him to the Cutchery close by, where the jemadar of police was staying, and charged him, then and there,

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with having caused the death of Badhan. Now, although the jemadar examined most of the other persons who were present on the scene, he did not examine Radha, and this does seem to show that at that particular time Radha did not occupy the position of a witness.

A number of objections have been taken before us to the evidence produced at the Sessions trial, and the manner in which that evidence was dealt with by the learned Judge in his summing up to the jury. I purpose to deal only with two of these objections. The first is concerned with the observations which the Judge made to the jury as to the discrepancies between the account given by the witnesses in the Court of Session, and the previous account of the transaction given by them to the police jemadar.

I observe that the Sessions Judge read out to the jury the depositions or statements of the witnesses which were recorded by the police jemadar. I think that this was not a proper course. Section 119 of the Code of Criminal Procedure provides that these statements shall not be signed by the person making them, nor shall they be treated as part of the record or used as evidence. It is, therefore, perfectly clear that these statements are not depositions, do not prove themselves, and cannot be treated as evidence. They might have been used by the police officer to refresh his memory. But even if this were done, the evidence given by the police officer after so refreshing his memory from these statements, and not the contents of the statements themselves, would have been the relevant evidentiary matter. There can be no doubt that the account given by the witnesses to the jemadar, and the account given by them at the trial, very materially vary. The Sessions Judge with reference to this said to the jury :—

"Undoubtedly the discrepancies between the statements to the jemadar and those now made were a matter for serious consideration. The statements to the jemadar were recorded by him on the day of the occurrence, and if he had correctly taken them down they were more likely to be truthful than those made in Court a month afterwards. Now there were two suppositions which might be made as to the discrepancies The first was that the jemadar had not accurately taken down the statements. The other was that the witnesses had really not mentioned Ram Lall and

Bhoran as giving the orders, and that the present statement to that effect and other alterations from the former statements were subsequent inventions of the witnesses. As regards the first supposition it was no doubt the case that the police did not always record statements correctly. This might arise from dishonesty and collusion, and it was evident in this case that the wealth was on the side of the prisoners. Some of them were zemindars and mokuraridars, while Mewa Singh and Radha Singh were poor men who had been sold out of their lands and almost out of their houses: or there might be mere neglect or stupidity without dishonesty."

I think that it was improper to suggest to the jury that the fact of wealth being on the side of the prisoners might have influenced the police jemadar in recording the statements made to him by the witnesses, there being no evidence on the record that the prisoners or any persons on their behalf attempted to tamper with the police jemadar.

The second objection is that the Sessions Judge was wrong in calling Dr. Shaw, the Civil Surgeon, to contradict the deposition of the Assistant Surgeon Moulvi Asder Ali Khan. It is further said that, even if Dr. Shaw's evidence could have been admissible, it ought not to have been admitted without calling the Assistant Surgeon, and giving him an opportunity of explaining more fully the reasons for the opinions expressed in his deposition. The essential part of the deposition of the Assistant Surgeon is as follows:—

"The skull was fractured from the left temporal bone across the parietal bone, and the fracture was terminated at the end of the sagittal suture. The fracture was about four inches long. There was also a superficial wound a little above the left temporal region about two inches above the ear. *Underneath this wound there was no fracture.* This was a slight superficial wound. There was also an abrasion below the right ear; this was very slight and superficial. Neither of the ears were hurt. On removal of the scalp I found a patch of extravasated blood about 4 inches long and 2½ to 3 inches broad just above the fracture." And further on: "In my opinion one blow caused the fracture. Any flat substance would have caused that fracture. Under no circumstances would a *lati* cause such a fracture, because a *lati* would have cut open the scalp, and would not have caused such a widespread extravasation of blood. Neither of these two *latis* in Court could have caused the fracture. I examined the body thoroughly, but found no other hurt. The hurt above the left temporal region and the abrasion below the right ear could not have been caused by these *latis* in Court, or any ordinary *lati*. The abrasion below

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the right ear may have been due to a fall, no *lati* whatever would have caused it.

Dr. Shaw was called as a witness, and the following question was put to him by the Sessions Judge:—

Question—"The Assistant Surgeon of Barh has stated in his evidence that the skull was fractured from the left temporal bone across the parietal bone, and the fracture was terminated at the end of the sagittal suture. The fracture was about four inches long. He has also said that no *latis* could produce the said fracture, because a *lati* would have cut open the scalp, and would not have caused such a widespread extravasation of blood. Can you state if in your judgment this opinion of the Assistant Surgeon is correct?"

Answer.—"In my opinion, the opinion of the Assistant Surgeon is not correct. A blow from a *lati* might be given with sufficient force not to wound the scalp at all. Besides, the superficial wound described by the Assistant Surgeon in his report as half an inch long and a little above the left temporal region corresponds with the fracture, for he goes on to say that on removing the scalp the skull was found cracked running from about two inches above the left meatus across the temporal bone, the parietal, backwards and upwards, terminating at the sagittal suture. Judging from this the superficial wound corresponded to the upper third of the fracture. A fracture may extend further than the external wound. The Assistant Surgeon is also not correct in stating that there could not be an extravasation of blood, 4 inches long and 2½ inches broad, caused by a round *lati*. Unless the wound has a particular appearance you cannot tell from a fracture whether it was caused by a flat board or a round *lati*. The *latis* in Court could have produced a wound like that described by the Assistant Surgeon."

There can be no doubt that Dr. Shaw in this deposition based his opinion in many important respects not upon the facts which the Assistant Surgeon stated, but upon facts somewhat, and in one respect essentially, different. The Assistant Surgeon stated in his evidence that underneath the wound, that is the superficial wound above the left temporal region, there was no fracture. Dr. Shaw by a course of reasoning arrived at a different fact, namely, that "the superficial wound corresponds to the upper third of the fracture; and upon this different fact in part bases his opinion. Then Dr. Shaw refers to the "report," that is the report of the *post-mortem*, written in the form usually filled up by Civil Surgeons at the time of making the *post-mortem* examination. Now this report was not evidence, and, therefore, no facts

could have been taken therefrom. The Assistant Surgeon might have used this report to refresh his memory when giving evidence; but the report itself was not admissible in evidence.

But there is a still further and a more important consideration. The Assistant Surgeon had actually seen the dead body, and had performed the *post-mortem* examination; and his evidence, as that of a medical expert was, therefore, admissible, first, to prove the nature of the injuries which he observed on the dead body; and, secondly, as opinion-evidence with respect to the manner in which those injuries were inflicted, and the cause of death. Now Dr. Shaw had not seen the dead body, and had not made the *post-mortem* examination, and the difficulty in which he felt himself placed appears from what he says in a subsequent part of his deposition, namely:

"It is difficult for me, without having seen the fracture, to form any definite conclusion about it. Reading a description would not help me so much as actually seeing the thing."

Dr. Shaw was in the position of an expert witness who could give nothing but opinion-evidence. The general rule as to evidence of this kind is that the questions must be put to the witness hypothetically, put in this way:

"Assuming such and such facts to be true, what is your opinion on the matter?" "Assuming such and such an injury, an injury of such and such a kind to have been inflicted, what is your opinion as to the nature of the weapon by which it was possibly or probably inflicted?"

The facts thus hypothetically stated to the witness would of course be the facts which the evidence of the other witnesses in the case attempted to prove, and as to which it was for the jury to find whether they had been proved or not. If in this particular case the Sessions Judge of Patna had put the question to Dr. Shaw, assuming the injuries deposed to by the Assistant Surgeon, and had asked Dr. Shaw his opinion as to the weapon by which these injuries might or could have been inflicted, there might perhaps have been no valid objection to the evidence. But even if this course had been pursued, I think that having regard to the importance of the question at issue, it would have been only fair to the prisoners to put the Assistant Surgeon into the witness box, and give him an opportunity of stating his reasons for the positive assertions contained in his deposition. I may

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observe that although s. 323 of the Code of Criminal Procedure allows the examination of a Civil Surgeon, taken and duly attested by a Magistrate, to be given in evidence in the Court of Session, it does not in any way preclude the Sessions Judge from calling the Civil Surgeon and examining him. And this course ought to be pursued in every case in which the deposition taken by the Magistrate is essentially deficient or requires further explanation or elucidation. Unfortunately, however, Dr. Shaw was not questioned in the manner just indicated; and he was asked to sit in judgment upon the Assistant Surgeon; asked substantially to exercise the functions of the jury in forming an opinion upon the credibility of the Assistant Surgeon's evidence. I think that this course was essentially an erroneous one. If the Assistant Surgeon had been placed in the witness box, and allowed to give his reasons for the views contained in his deposition, he might have stated further facts, observed upon the *post-mortem*, which would strongly support the correctness of his views, or under further examination he might himself have seen reason to modify the positive opinion expressed by him before the Magistrate, and if Dr. Shaw had been questioned, assuming the facts to be as stated by the Assistant Surgeon, this gentleman also might have stated the reasons for his views. If as the result there was any substantial difference of opinion between the Civil Surgeon and the Assistant Surgeon, the jury would have been in a position to judge for themselves which view appeared to them most likely to be correct. I think that having regard to the great materiality of the question as to the weapon used, it is impossible to say otherwise than that the prisoners have been prejudiced by the manner in which the medical evidence was dealt with by the Judge and placed before the jury. Under these circumstances I think that this conviction must be set aside.

I have carefully considered the further order which ought to be passed in this matter, and I think that there ought to be a new trial. The prisoners called no witnesses to support the case set up by them; and, this being so, I cannot feel satisfied that their defence is so extremely probable as to make it undesirable in the interests of justice that they should a second time undergo a trial upon the serious charges preferred against them. I think

I ought to point out that while two of the prisoners Ram Charan and Kanya have been convicted of abetting murder, there is nothing to be found in the Judge's charge explanatory of the law of abetment, and it does not appear what particular conduct on their part was considered to amount to abetment within the definition under s. 107 of the Indian Penal Code.

Re-trial ordered.

APPELLATE CIVIL.

Before Sir Richard Garth, Knight, Chief Justice, and Mr Justice Field.

RAM CHUNDER PODDAR AND OTHERS (DEFENDANTS) *v.* HARI DAS SEN (PLAINTIFF).*

1882. *November* 30.

Hindu Law—Widow's Estate—Conveyance by presumptive heir—Ratification by widow—Effect of witnessing deed on rights of witness—Res judicata.

During the lifetime of a Hindu widow, her son, the then presumptive heir to the property of which she was in possession, conveyed it to purchasers by deeds to which she was not a party. Subsequently she by separate deed ratified the conveyances This deed was witnessed by a more remote reversioner. The son died during the lifetime of his mother, and the witness to the deed of ratification became the next reversionary heir.

Held, in a suit by him after the widow's death for possession, that at the time of the conveyances the son had a mere contingent reversionary interest in expectancy, and that the subsequent ratification by his mother could not operate as a surrender of her estate so as to change the conveyances, and make them enure as absolute conveyances, but could only amount to a conveyance of her interest.

Held, also, that the fact that the reversionary heir witnessed the deed of ratification, did not in itself amount to evidence of consent to it on his part.

A Hindu widow and her son, the then presumptive heir to property claimed by the widow, obtained a decree against a more remote reversionary heir. The son predeceased his mother, and the person against whom the decree had been obtained became the next reversionary heir.

Held, in a suit for possession by him, that the decree in the previous suit did not operate as a *res judicata*.

* Appeal from Appellate Decree No. 529 of 1881, against the decree of R. F. Rampini, Esq., Acting Judge of Dacca, dated the 11th January 1881, reversing the decree of Baboo Gunga Churn Sircar, Subordinate Judge of that district, dated the 16th July 1880.

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THIS was a suit to recover possession of a share in certain talooks.

One Durpo Narain Roy died leaving three sons, Shib Das, Kali Das, and Kashi Das Roy. Shib Das died leaving a son Durga Das, who died leaving two sons, Hari Das, the plaintiff, and Rutneswar. Kali Das died leaving a daughter Monikornika, and a grandson Kashi Kishore, who predeceased his mother. Kashi Das died leaving a son Dabi Das, who died without issue.

On the 25th Magh 1256 (8th February 1850) Kashi Kishore sold the property in dispute to certain persons, the predecessors of the defendants. Monikornika was not a party to the deeds by which the property was conveyed, but on the 8th Assin 1263 (22nd September 1856) she ratified the conveyance by a separate deed. This deed was witnessed by the plaintiff.

It appeared that previously to the time when the conveyances were made by Kashi Kishore, Monikornika and he had sued, among other persons, the plaintiff, to recover possession of the property sought to be recovered, and had obtained a decree. Monikornika died in 1879, leaving the plaintiff and Rutneswar her surviving, and without leaving any issue. Kashi Kishore having died during her lifetime the plaintiff now sued as reversionary heir of Monikornika's father Kali Das, to succeed to a moiety of the property held by Monikornika. The defendants contended that the sale by Kashi Kishore was for necessary purposes, and that the plaintiff and Monikornika consented to it. They also contended that the plaintiff had ratified the sale by witnessing the deed of the 8th Assin 1263 (22nd September 1856); and further that the plaintiff was barred by the decree in the suit against him by Monikornika.

The Subordinate Judge dismissed the suit, holding that Kali Kishore had a good title to convey, and that the plaintiff had ratified the conveyance by Kashi Kishore. On appeal the district Judge reversed this decision, holding that Kashi Kishore had no right to the property, and that he could execute no valid conveyance of it. He also held that the fact that the plaintiff witnessed the deed of the 8th Assin 1263 (22nd September 1856) did not amount to a ratification. The defendants appealed to the High Court.

Baboo *Mohini Mohun Roy* and Baboo *Lall Mohun Doss* for the appellants.

Baboo *Rash Behary Ghose* for the respondent.

The following judgments were delivered :—

GARTH, C.J.—These suits were brought by two different plaintiffs to recover two several portions of the same property. They were dealt with by the Courts below in one judgment, the plaintiff's claim being dismissed in each case by the Subordinate Judge, and decreed by the District Judge.

I propose to deal with one of the suits only, No. 529, and the same judgment will dispose of them both.

The plaintiff in that suit is Hari Das Sen. He claimed as the reversionary heir of one Kali Das Roy, and he says that his title accrued upon the death of one Monikornika, who was the daughter of Kali Das Roy. She died in 1879.

There is no doubt that the plaintiff was the reversionary heir of Kali Das Roy.

The defendants claim the property under two kobalas, dated the 25th Magh 1256 by which the property was conveyed to the predecessors of the defendants by a person named Kali Kishore Das, who was the son of Monikornika; and who, at the time when the conveyance was made, was the presumptive heir to the property; that is, if Monikornika had died at that time, he would have been the reversionary heir of Kali Das Roy.

The District Judge has decided that the defendant's predecessors in title took nothing under these kobalas, because Kali Kishore had at that time merely a contingent reversionary interest in the property, and he afterwards died or disappeared; so that at the time of Monikornika's death Kali Kishore was not forthcoming as the reversionary heir.

The learned pleader for the appellant has attempted to meet this difficulty in two ways.

In the first place he says that at the time when Kali Kishore executed these kobalas, he and Monikornika had brought a suit to recover possession of the property against several defendants, and amongst them, against the present plaintiffs; and as a decree was obtained by Kali Kishore and Monikornika in that suit

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against all the defendants, it must be taken as against the present plaintiffs that they had a joint interest in the property, or at any rate that Kali Kishore had some substantial interest in it at that time; and that the decree operated as a *res judicata* between the parties to establish such an interest.

But upon looking into the proceedings in that suit, we find it clearly shewn that Monikornika was the person then entitled to the property as the daughter of the former owner, Kali Das Roy, and that Kali Kishore was her son; and there is nothing in the judgment to lead us to suppose that the Court intended to find a different state of things.

It is probable that Kali Kishore was made a party to that suit, because he had been put into possession of the property by Monikornika as her agent and manager, and it was thought advisable to make him a party in that character; or possibly he may have been made a plaintiff, because he was presumably at that time the reversionary heir; but in either case the mere fact of his being made a plaintiff, and recovering a decree against the present plaintiffs in conjunction with Monikornika, does not debar us from ascertaining in this suit what his and Monikornika's respective interests really were.

Now it is clear that Kali Kishore had no interest in the property at that time, except a possessory interest as manager, and a contingent reversionary interest after Monikornika's death. The decree, therefore, does not assist the defendants' case.

The appellant's pleader then relies upon another piece of evidence, a deed, which is called a deed of ratification, made to the defendant's ancestors by Monikornika herself on the 8th of Assin 1263. By that deed, Monikornika professed to ratify the kobala that had been made by Kali Kishore in 1256; and it is said that the ratification, coupled with the deed of 1256, had the effect of transferring the whole property absolutely to the defendants; and in support of this view we were referred to some authorities, and amongst others, to a case of *Triloochun Chuckerbutty* v. *Umesh Chunder Lahiri* (1), decided by Morris and Prinsep, JJ.

In that case a Hindu widow, who had inherited her husband's estate, conveyed away that estate by deed with the concurrence

(1) 7 C. L. R., 571.

of the presumptive reversionary heir; and it was held, following a previous decision of Bayley and Markby, JJ., to which I shall presently refer, that the alienation made by the Hindu widow, with the concurrence of the reversioner, had the effect of passing the whole estate.

It would appear from the report that the learned Judges were at first disposed to think that the consent of the reversioner was not enough to pass the estate; but they seem to have considered themselves bound by the judgment in the case to which I have referred.

That case was *Mohunt Kishen Geer* v. *Busgeet Roy* (1), and it is necessary in determining how far that case is binding upon us as an authority, to ascertain what the facts of it really were, and what was the ground of the Court's decision.

In that case a Hindu widow, who had inherited certain property from her husband, had, in conjunction with the next reversionary heirs to that property, executed a conveyance to a purchaser; and Bayley and Markby, JJ., seem to have considered that such a deed operated to convey any estate which those persons by any arrangement amongst themselves had the power of conveying.

Markby, J., in his judgment, after saying that the whole estate passed, observes: "To hold otherwise would only necessitate the adding of two or three words to the conveyance, because the widow may at any time surrender the property to the apparent next taker, who will then become absolute owner."

It seems then that this judgment proceeded upon the ground that, in the view of the learned Judges who were parties to it, the conveyance operated, first as a surrender of the widow's estate to the reversionary heirs, and then as an absolute conveyance by them to the purchaser of their interest in the property.

I confess that if the facts of the present case were substantially the same as those of the two cases I have mentioned, I should like to consider whether they were rightly decided; but it seems to me that the facts here are very distinguishable.

There never was in this case, as it seems to me, any conveyance by the widow and Kali Kishore Das, which could operate in law

(1) 14 W. R., 379.

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as a surrender by the widow, and a conveyance of the reversionary interest, which Kali Kishore would have taken upon that surrender. And for this reason; because his kobala was executed in 1256, seven years before the deed of ratification by the widow. At the time when he executed this conveyance it is clear that he had a more contingent reversionary interest in expectancy; that being so, the ratification of that conveyance by the widow seven years afterwards could not have operated as a surrender of her estate, so as to change the effect of Kali Kishore's previous deed, and make it enure as an absolute conveyance of the property. It seems to me that her deed could only amount to a conveyance of her interest.

Then the appellant's pleader further argues that the subscribing witnesses to this deed of ratification were the plaintiffs themselves, and that as they signed the deed as subscribiing witnesses, they must be taken to have consented to and to have known the effect of it.

I think that as a proposition of law that doctrine cannot be maintained. No doubt if parties subscribe a deed as witnesses, and there is evidence, or the circumstances of the case induce the Judge to believe that they knew what the contents of the deed were, the Judge is at liberty to infer that they were consenting parties to it.

But the inference so drawn by the Court would be *an inference of fact;* and we have no right to make such inferences on second appeal. We were referred to the case of *Rajlakhi Debia* v. *Gakul Chandra Chowdhry* (1), in which the Privy Council, as I understand the report, distinctly say that the mere fact of a person attesting a deed is no evidence in itself that he consented to it, or knew its contents, and a passage has been also cited from Sugden on Vendors and Purchasers to the same effect.

I should have thought that no authority was necessary for such a proposition. It constantly happens that persons subscribe deeds as witnesses without having the least notion what they contain; and if people were to be held bound by any instrument which they so subscribe, it might be a dangerous thing to witness any other man's signature.

(1) 3 B L. R., P. C, 57.

No doubt in such a case as that of *Matadeen Roy* v. *Mussoodun Singh* (1), to which we were referred, decided by Peacock, C.J., and Mitter, J., there would be strong ground for presuming knowledge of the contents of the deed, and consent to the deed being made.

That was the case of two brothers, who were co-sharers in a property; one of them conveyed the whole of that property, absolutely to a purchaser, and the other brother stood by, and was a subscribing witness to the deed. It does not appear what the other evidence in the case was; but both Courts below had inferred, as a matter of fact, that the brother who subscribed his name as a witness knew the contents of the deed, and was a consenting party to it; and all that Peacock, C.J., and Mitter, J., decided was, that they had no right to say, as a matter of law, that the inference which the lower Courts had drawn was wrong. It was an inference of fact which they, sitting in Special Appeal, had no ground for questioning.

But here we are asked to say that the District Judge was wrong in not drawing such an inference. We clearly should not be justified in saying anything of the kind.

It appears to me, therefore, that there is no sufficient ground for disturbing the judgment of the Court below. It may be that the justice of the case is with the defendants. It has been pressed upon us that the defendants have been in possession for a good many years; that they have given good consideration for the property; and that it is very hard that they should be ousted from it.

This may be all very true; but unhappily in the present state of the law we have no power to do full justice between parties in second appeal. We have only to decide whether, so far as we can see, the lower Appellate Court has been guilty of any error of law.

It seems to me that there is no ground for disturbing the lower Court's judgment; and I think that this appeal, and also the appeal No. 531, should be dismissed with costs.

FIELD, J.,—The property which forms the subject of these two appeals admittedly belonged to one Kali Das. The plaintiffs are the grandsons of Shiva Churn, the uterine brother of Kali Das.

(1) 10 W. R., 293.

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After the death of Kali Das and Kali Das's widow, a suit was brought in 1252 by Monikornika, the daughter of Kali Das, and her son Kali Kishore, as joint plaintiffs, to recover certain property which included the properties forming the subject of the present litigation. Monikornika and Kali Kishore obtained a decree, and in 1253 took possession in execution of that decree. Subsequently, that is on the 25th of Magh 1256, Kali Kishore sold the property to defendants in the present case, and on the 8th of Assin 1263 Monikornika, who had not joined in the conveyance of 1256, gave to the defendant a letter of ratification.

Now the first question which we have to consider is, what did Monikornika and Kali Kishore obtain by the decree of 1253.

It has been contended that they obtained an absolute and complete title to the property, and that we cannot go behind their decree in order to determine what their interest under the decree really is.

I think that it is not necessary to go behind the decree. Upon the language of the decree itself, it appears to me clear that Monikornika and Kali Kishore obtained nothing more than the interest to which they were entitled under the ordinary Hindu law.

The decree recapitulates the contents of the plaint, sets out the fact of Kali Das's death and the death of Kali Das's widow, and proceeds to allege that Monikornika and Kali Kishore are in consequence the rightful owners (Nagdar malik) according to the Shastras.

Now, according to the Shastras, the right of property which they possessed was a life interest, so far as Monikornika was concerned, and a reversionary right, so far as Kali Kishore was concerned. It, therefore, appears to me that they acquired, by the decree, not an absolute interest, which entitled them to dispose of the property at their will and pleasure, but such an interest as Hindu law confers upon persons in their position.

In the conveyance of 1256 reference is made to the decree; and in the subsequent letter of ratification, the decree is again referred to; and it appears to me (no question of purchase for valuable consideration without notice being raised) that what the purchaser under the conveyance of 1256 and the letter of rati-

fication of 1263 took was the interests which Monikornika and Kali Kishore acquired under the decree of 1253, that is, their interests under ordinary Hindu law.

It has been contended that this case ought to be decided upon the principle laid down in the cases of *Mohunt Kishen Geer* v. *Busgeet Roy* (1); *Raj Bullubh Sen* v. *Oomesh Chunder Roy* (2); and *Trilochun Chuckerbutty* v. *Umesh Chunder Lahiri* (3); the principle that is that a conveyance by the widow and the immediate reversioner is a good conveyance of the absolute title, even as against any reversioner who, not being the next reversioner at the time of the conveyance, subsequently, by the death of a nearer reversioner, became entitled to the property upon the death of the widow.

It appears to me that this case can be properly distinguished from the principle upon which the cases just cited were decided. Were it otherwise, with the greatest respect for the learned Judges who decided these cases, I am, as at present advised, by no means satisfied of the soundness of that principle. It may well be contended that although the presumptive reversioner may make a good conveyance of his own reversionary right, he cannot grant away the reversionary right of another and more remote reversioner who may possibly derive title through another and different line of descent. It is not necessary, however, on the present occasion to pursue this question further, because, in the cases now before us, there has been no conveyance executed by Monikornika, the widow, and Kali Kishore, the presumptive reversioner, jointly.

But then it is contended that the effect of the conveyance of 1256, taken with the subsequent letter of ratification, is really the same as if the widow and the presumptive reversioner joined in conveying the property.

It appears to me that this is not so. It would have been possible for the widow to retire in favour of the next reversioner, and if that had occurred Kali Kishore would have become the owner of the property, and might have conveyed an absolute interest therein. But there is no suggestion that this ever took

(1) 14 W. R., 379.

(2) I. L. R., 5 Calc., 44.

(3) 7 C. L. R., 571.

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place, and all that Kali Kishore could convey in 1256 was his own reversionary interest, and when Monikornika granted the letter of ratification in Assin 1263, it appears to me that the only effect this could have was to ratify the conveyance, so far as regarded her own life interest, which she had obtained under the decree to which the letter of ratification expressly refers.

There was, then, a valid transfer of Kali Kishore's reversionary interest, which subsequently by his civil death became valueless; and there was a valid conveyance of the widow's life interest; but that act which upon the authority of the cases already noticed could have made these two coalesce so as to create an absolute ownership in the property never took place. Neither did Monikornika retire in favour of Kali Kishore, nor did Monikornika and Kali Kishore at the same time execute a joint conveyance.

It has then been contended that inasmuch as the letter of ratification of 1263 was witnessed by Hari Das and Rutneswar, the plaintiffs in the present cases, they are estopped from saying that the letter taken with the previous conveyance had not the effect of transferring an absolute interest.

Now, in the first place, it has been pointed out by my lord that the Judge in the Court below has found against this contention on the question of fact. He has found that Hari Das and Rutneswar are not estopped by the contents of that letter. In the next place, supposing that they were well aware of the contents of that letter, in the view that I have already taken, that letter merely amounted to a ratification of the transfer of the life interest, and the fact of Hari Das and Rutneswar ratifying by their attestation the transfer of the widow's life interest, cannot estop them from claiming the property upon the widow's death, when they become the immediate reversionary heirs entitled to possession.

For these reasons it appears to me that the view taken by the Judge below is correct, and that these appeals must therefore be dismissed with costs.

Appeals dismissed.

SMALL CAUSE COURT REFERENCE

Before Sir R Garth Knight, Chief Justice, and Mr Justice Wilson

G C SIMSON AND OTHERS *v* GORA CHAND DOSS.

1883
February 2

Contract—Sale of Goods—Delivery by instalments—Tender—Abandonment of Excess—Extension of Jurisdiction of Small Cause Court

A contract made between the plaintiffs and the defendant stipulated for the delivery to the defendant of 7 500 bags of Madras Coast castor seed, which were to be shipped "per steamers' and then stated that shipment of 2 500 bags was to be made in December On the 12th December 1,690 bags arrived by Steamer Shahjehan' and notice in writing was given to the defendant, who requested that the delivery might be postponed owing to his not having godown room On the 14th December the defendant refused to take the 1,690 bags, on the ground that he was not bound to take a portion of the 2,500 bags, but only the whole at one time On the 16th December the defendant tendered the value of 2,500 bags which was refused, and on the same day the plaintiffs resold the 1,690 bags On the 17th December the plaintiffs informed the defendant that 810 bags the balance of the 2 500 the December shipment, were due on the 18th, and they did arrive on the 19th, but were refused by the defendant on the same ground as before, and they were accordingly resold by the plaintiffs

Held that according to the terms of the contract there was a legal and proper tender of the December shipment by the plaintiffs, and that the defendant having committed a breach of the contract in not accepting the bags the plaintiffs were justified in reselling them at once and suing for damages

Whilst the pecuniary jurisdiction of the Small Cause Court was limited to Rs 1,000, the plaintiffs brought a suit for that amount for damages for breach of a certain contract after abandoning the excess, and in that suit they elected a non suit under s 53, Act IX of 1850

Held, in a suit brought in respect of the same damages for the full amount due to them, that the plaintiffs were not precluded by their having abandoned the excess in the former suit, from recovering the full amount sued for

THE following case was stated for the opinion of the High Court by H Millett, Esq, Chief Judge of the Court of Small Causes of Calcutta, under s 69 of Act XV of 1882, and s 617 of the Code of Civil Procedure .—

"In this suit a special case has been signed and filed by the pleaders of both parties, leaving it for this Court to come to a

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conclusion on the facts so stated, on the understanding that the matter is to be referred to the High Court. Though practically a special case, two matters are left for the Court to adjudicate upon rather as questions of fact than of law. They are these: Firstly, whether the two shipments alleged to have been made in December have been proved to have been so made by the evidence of two witnesses examined *de bene esse* in this case; secondly, as to what was the ground on which the previous suit between the same parties on the same cause of action was non-suited. I propose, though somewhat out of order, to deal with these two points at once.

"First: After hearing the evidence of William Edge, Master of the Steamer 'Shahjehan,' and of Peter Sutton Budd, Master of the Steamer 'Shahzada,' I am satisfied the two shipments of 1,690 bags and 810 bags, respectively, were made in the month of December, and are therefore so far in compliance with the terms of the contract. Second: The first suit was instituted between the parties on the 15th April 1882, heard on the 9th and 12th June, and judgment given on the 23rd June 1882; all the proceedings therefore in that suit were governed by Act IX of 1850, and not by Act XV of 1882, the Act which at present governs the procedure of this Court. In that suit no evidence was produced to prove that the two shipments above referred to were made in the month of December. Taking the case of *Bowes* v. *Shand* (1) as a guide, it appeared to me that it was necessary for the plaintiffs to prove this fact before they could succeed, and in delivering judgment I suggested to Mr. Gasper, the pleader of the plaintiffs, the advisability of this course. He accordingly elected a non-suit under s. 53 of Act IX of 1850, and brought the present suit on the 6th July 1882.

"Though the facts are fully set out in the special case, it may be well shortly to summarize those material to this dispute.

"The contract was dated the 22nd November 1881, and was for the delivery of 2,500 bags of Madras Coast castor seed, shipment in December 1881. On the 12th December 1881, 1,690 bags arrived by the Steamer 'Shahjehan,' and notice in writing was given to the defendant, who requested the delivery to be

(1) L. R., 2 App. Cas., 455.

postponed owing to his not having godown room. On the 14th December 1881 the defendant, then acting under the advice of his attorneys, refused to take the 1,690 bags, on the ground that he was not bound to take a portion of the 2,500 bags, but only 2,500 at one time. On the 16th December the defendant tendered the value of 2,500 bags which was refused, and on the same day the plaintiffs resold the 1,690 bags, being the shipment by the 'Shahjehan.' On the 17th December the plaintiffs informed the defendant that 810 bags, the balance of the 2,500 bags December shipment, were due on the 18th of the same month, and they did arrive on the 19th. This lot of 810 bags the defendant refused to take on the same grounds as those stated with respect to the previous lot of 1,690 bags, and they were accordingly resold by the plaintiffs.

"The first question is whether the tender of 1,690 bags and 810 bags in two separate lots was a proper tender in accordance with the terms of the contract. I may state at the outset that no difficulty could arise on the meaning of the word 'shipment,' for both the steamers in which the two lots arrived were at Coconada, the port of shipment, for about 48 hours each, and that in the month of December. It is necessary also to remark that the first tender of 1,690 bags was a tender of that number as 'part of 2,500 bags.' At the hearing of the previous suit the question now raised was fully argued by Counsel, and the pleaders of both parties have now without argument left me to decide it. Several cases were then cited, but in my opinion only one, *viz.*, *Brandt* v. *Lawrence* (1), really touches the point now in dispute. It must be remarked that the alleged breach is not a failure to ship any monthly shipment, for the monthly shipment was made, but the failure to tender the whole of one monthly shipment at one and the same point of time. In *Hoare* v. *Rennie* (2) the contract was to make certain shipments of iron in June, July and August. The pith of the dispute is stated in the judgment of Watson, B., thus: 'The contract is for the shipment of a quantity of iron in certain proportions to be paid for on delivery. On performance of the contract the defendants agree to

(1) L. R. 1 Q. B. D., 344 (2) 5 H and N., 19.

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pay for the iron. The breach charged is that the *defendants* shipped a small quantity in June, and declared they would not ship any more.' There is evidently a mistake in this report, as the word *defendants* should be 'plaintiffs,' for it was the plaintiffs who had to ship. The distinction between that case and this is apparent, for here the plaintiffs have all along alleged that the tender of the 1,690 bags was only a part performance of the contract. The same remarks will apply to *Reuter* v. *Sala* (1). The contract there was for 25 tons of Penang pepper. The plaintiffs, the shippers, alleged that they had tendered 25 tons, making a declaration of 25 tons as a tender of the whole. The defendants, the buyers, said there were only 20 tons, which was found to be the case, and they were accordingly found to be entitled to refuse such number as being an incomplete tender. In *Honck* v. *Muller* (2), the contract was to deliver certain iron equally in November, December and January. The plaintiff, the buyer, failed to take delivery of the November instalment, but insisted upon his right to take the other two; and it was found he was not so entitled. The learned Judges in that case approved of *Hoare* v. *Rennie*, no reference having been made either in the course of the argument or in the judgment to *Brandt* v. *Lawrence*, decided four years previously *Brandt* v. *Lawrence* (3) was a case in which the plaintiff agreed to ship 4,500 quarters of Russian oats during February. In that month he shipped 1,139 quarters, and tendered them to the defendant in part fulfilment of the contract; the defendant refused to accept them. The plaintiffs afterwards shipped, but not in February, the balance of the 4,500 quarters, which the defendant also refused to accept, and the question was whether the defendant was bound to accept the 1,139 quarters which arrived within time, and it was held he was. This is, if anything, a stronger case than the present one; for all the goods have in this case arrived within time, and if *Brandt* v. *Lawrence* is good law, the defendant was bound to accept the 1,690 bags tendered as a portion of the whole 2,500. There is no material difference in the wording 'by steamer or steamers' as used in the contract in *Brandt* v.

(1) L. R., 4 C. P. D., 239.

(2) L. R., 7 Q B D., 92. (3) L. R., 1 Q B. D., 344.

Lawrence, and the wording 'per steamers' as used in this contract. This point, therefore, I find in favour of the plaintiffs.

"The second question to some extent depends upon the first. On it, it is contended that the plaintiffs had no right to resell the first lot until the whole quantity had arrived; but if the tender of the first lot was a good one, and the defendant refused to accept it, the plaintiffs had a right to resell on such refusal. I am far from saying that any such action would be taken if the plaintiffs had only tendered a small lot, but under the circumstances stated I am of opinion that there was a substantial performance of the contract, and that they are, therefore, entitled to succeed.

"The third question raised affects the right of the plaintiffs to recover in this suit more than Rs. 1,000. The first suit brought was for Rs. 1,000, after abandoning an excess of Rs. 132-6-7 and all other excess. At that time this Court had no jurisdiction to hear a suit of a higher value, so that the plaintiffs, if they wished to bring their first suit in the Small Cause Court, could not recover more than that amount.

"At the time the second suit was instituted the pecuniary jurisdiction of the Court had been increased to Rs. 2,000, and they then claimed the full amount of damages alleged by them. The effect of the non-suit was to put the plaintiffs, except as regards limitation, in exactly the same position they were in formerly, and I can see no objection to their bringing the suit for the amount claimed. If the jurisdiction of this Court had not been extended, there would, I presume, have been nothing to prevent the plaintiffs bringing the first suit in the High Court had they been so disposed. This question will also be decided in favor of the plaintiffs.

"These are the only three points in the statement given to me by the pleaders, and as there is no dispute as to the amount of damages, there will be a decree for the plaintiffs for the full amount sued for.

"The questions for the opinion of the High Court will be—

"1. Whether there was a legal and proper tender on the part of the plaintiffs, and whether there was a breach on the part of the defendant.

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"2. Whether the tender of a portion of the goods contracted for was a sufficient tender to entitle the plaintiffs to resell and sue for damages; and whether the plaintiffs were justified before the expiration of December in reselling a portion of the goods after the defendant had made a tender of the full price.

"3. Whether the plaintiffs are now entitled to recover any amount in excess of Rs. 1,000, they having abandoned an excess above that amount in the previous suit.

"Contingent on the opinion of the High Court there will be a decree for the plaintiffs for the full amount claimed."

Mr. *Phillips* and Mr. *Lowis* for the plaintiffs.

Mr. *Pugh* for the defendant.

The following were the opinions of the Court (GARTH, C.J., and WILSON, J.)

GARTH, C.J.—I think that this case is abundantly clear. It seems to me that the learned Judge is right on both points, and that we should answer the questions referred to us in accordance with that view. I think that the defendant should pay the costs of this reference.

WILSON, J.—I am of the same opinion. I would only add a few words. It appears to me that what we have first to do is to ascertain the terms of the contract. The contract is for the delivery of 7,500 bags of castor seeds which were to be shipped "per steamers," and then the contract goes on to state, "shipment 2,500 bags per S.S. 'Moharaja,' now expected on Madras Coast, 2,500 bags in December 1881 and 2,500 bags in January 1882." "Terms cash on delivery, which is to be taken from steamer's side, Calcutta, or from jetty on arrival of steamer."

This is the whole of the contract so far as it is material, and taken altogether it seems to me abundantly clear from it that so far as the two latter portions are concerned, the 2,500 bags are to be delivered in December and 2,500 bags in January, having been shipped by "steamers," which, I think, clearly means shipped by any number of steamers, provided that the instalment sent by each steamer is a reasonable one, and then delivery is to be taken

from the ship's side or from the jetty on arrival of each ship, and cash paid on delivery.

This seems to me to be a perfectly clear contract, and it agrees as closely as possible with the contract in the case of *Brandt* v. *Lawrence* (1), in which case also the option of shipping in several instalments was given, and yet each instalment was to be received on arrival and paid for on delivery. On that construction of the contract, it follows of necessity that the plaintiffs were entitled to tender the goods as they did tender them, and that the defendant was bound to receive and pay for them.

With regard to the case of *Reuter* v. *Sala* (2) it has no very close bearing on this case. The question in that case, so far as it concerns the present, was whether the *contract* there made was severable, whether it might be split up and the person who entered into it might refuse to perform or disable himself from performing a portion and yet insist on performing the rest. The Court there held that a contract cannot be split up in that sense. The question in this case is not whether the *contract* may be split up, but whether the *performance* of it may be divided, and that depends on the terms of the contract. I concur, therefore, in the mode in which it is proposed to answer the questions referred to us.

Attorneys for the plaintiffs : Messrs. *Watkins* and *Watkins*.

Attorneys for the defendant : Baboo *W. C. Bonnerjee* and *Son*.

APPELLATE CIVIL.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Field.

HURY DOYAL GUHO (DECREE-HOLDER) *v.* DIN DOYAL GUHO (JUDGMENT-DEBTOR.)*

1883 *January* 29.

Set-off—Cross decrees—Civil Procedure Code (Act X of 1877) *s.* 246.

A judgment-debtor may set off against the amount of the decree against him, the amount of a decree which he has obtained against the decree-holder and other persons.

* Appeal from Appellate Order No. 211 of 1882, against the order of R. F. Rampini, Esq., Judge of Dacca, dated the 6th April 1882, affirming the order of Baboo Nobin Chunder Gangooly, First Subordinate Judge of that district, dated the 23rd January 1882.

(1) L. R. 1 Q. B. D., 344. (2) L. R 4 C. P. D., 239.

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In this case one Hury Doyal Guho sought to execute a decree which he had obtained against one Din Doyal Guho. The Subordinate Judge allowed Din Doyal Guho to set off a sum of Rs. 51-13, the amount of a decree which he had obtained against Hury Doyal Guho and another person. Hury Doyal appealed to the District Judge, who held that the set-off was allowable and dismissed the appeal. Hury Doyal appealed to the High Court.

Baboo *Boykunt Nauth Dass* and Baboo *Koluda Kinkur Roy* for the appellant.

Baboo *Guru Dass Banerji* for the respondent.

The following judgments were delivered :—

FIELD, J.—Three points were raised in the grounds of appeal in this case. The first point (as to costs), and the third point raised in the first and third grounds of appeal respectively were given up at the hearing; and we have only to dispose of the question raised in the second ground of appeal.

The decree-holder (appellant) Hury Doyal Guho Mujumdar contends that the Court below was wrong in allowing the judgment-debtor Din Doyal Guho to set-off against the amount of the decree-holder's decree the sum of Rs. 51-13, being the amount of a decree which Din Doyal, the judgment-debtor, had obtained against the decree-holder appellant and another person. I have considered this matter, and think that the decision of the learned District Judge is correct upon this point. Illustration (*b*) of s. 246 of the Code of Civil Procedure is as follows: "A and B co-plaintiffs obtain a decree for Rs. 1,000 against C, and C obtains a decree for Rs. 1,000 against B. C cannot treat his decree as a cross-decree under this section." The reason of this is plain. The liability of C under the decree obtained by A and B is a liability not to B only, who is C's debtor under the second decree, but to B and another person A.

In the case now before us A, the decree-holder, has obtained a decree against C, namely the decree which is now being executed, but C also obtained a decree against A and B, namely the decree for Rs. 51-13. Now it is clear that C could, if he chose,

execute this second decree for the whole amount as against A. He is, therefore, in my opinion equally entitled to execute in another way, that is, by setting off the amount thereof as against A's decree. This was the very point decided in the case of *Mitchell* v. *Oldfield* (1).

I think, therefore, that the order of the District Judge is correct, and that this appeal should be dismissed with costs.

GARTH, C.J.—I have had some doubt about this case, but as my learned brother is disposed to approve of the judgment of the Courts below, and as his view is in accordance with the English authorities, I do not think it right to differ from him.

My doubt has arisen from the language of s. 246. That section is a re-enactment of s. 209 of the old Code; and both are founded upon the equitable principle, which has long prevailed in England, of setting-off cross judgments in execution (see Archbold's Chitty's Practice, 11th edition, 711). My learned brother is quite right in saying that according to the English rule the judgment-debt due from Din Doyal in this case would have been set-off against the debt due to Din Doyal from Hury Doyal and another; the principle being, that if the decree-holder in the one case has a right to take out execution against the decree-holder in the other case, the judgment may be set-off.

But s. 246 provides that this shall be done only *when the cross decrees are "between the same parties;"* and a strict adherence to this language would no doubt tend to simplify the rule, although it would contract its operation.

I am not disposed, however, to dissent from the view of my learned brother. It is undoubtedly consonant with justice, as well as with the English rule, although it may sometimes render the application of the section more difficult to the subordinate judiciary.

Appeal dismissed.

(1) 4 T. R., 123.

PRIVY COUNCIL.

P. C.*
1882
Nov. 15 & 16.

HURRISH CHUNDER CHOWDHRY (JUDGMENT-DEBTOR) *v.* KALI-SUNDERI DEBI (JUDGMENT-CREDITOR)

[On Appeal from the High Court at Fort William in Bengal.]

Transmission for execution of order of Her Majesty in Council—Civil Procedure Code, Act X of 1877, *ss.* 231, 588, 598 *and* 610—*Evidence of such order—Appeal against an order of a Judge of the High Court refusing transmission—Letters Patent,* 1865, *s.* 15—*Execution on the application of one of several decree-holders.*

The provisions of Act X of 1877, s. 610, are not to be construed as restricting the only admissible evidence of an order of Her Majesty in Council to a certified copy, on an application for execution made under that section. They must be read as directory, having the object that proper information regarding the order shall be supplied to the Courts in India.

Where the original order (given, according to the practice in England, to the successful party, or to one of such parties) had not been filed in the High Court, so as to enable the proper officer to supply a certified copy: *Held* that a copy, though not certified by him, might accompany a petition for execution under s. 610.

A decision by the Judge appointed to dispose of matters relating to appeals to Her Majesty in Council, refusing to transmit for execution her order restoring a decree, is a judgment within the meaning of s. 15 of the Letters Patent of 1865, and is appealable to the High Court.

Held, also, that a refusal to transmit such an order for execution was not a misapprehension on the part of the Judge of the extent of his jurisdiction, although, if it had been, this itself would have been a ground of appeal.

Section 588, Act X of 1877, restricting appeals against orders, does not apply to prevent an appeal to the High Court from the order of a Judge of that Court

The effect of a Privy Council judgment being that each of two co-plaintiffs was entitled to a moiety of a taluk in the possession of the defendant, who then purchased the interest of one of them: *Held* that the other co-plaintiff could obtain execution according to the extent of her interest in the estate.

APPEAL from an order of the High Court (13th January 1881) reversing an order (27th February 1880) made by the Judge appointed to dispose of matters relating to appeals to Her Majesty in Council. The order of the High Court directed

* *Present*. LORD FITZGERALD, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH and SIR A. HOBHOUSE.

transmission (Act X of 1877, s. 610) which the Judge had refused, of an order of Her Majesty in Council (18th April 1878) for execution by the Subordinate Judge of the Mymensingh district. That order in Council had been issued upon a judgment to the effect that a decree of the High Court (5th August 1875) should be reversed, and that a decree (10th March 1874) of the Subordinate Judge of the Mymensingh district should be restored.

This appeal arose out of orders made on proceedings taken in execution after the judgment of the Judicial Committee, and issue of the order of Her Majesty in Council thereon, in *Bhoobun Mohini Debia* v. *Hurrish Chunder Chowdhry* (1). That suit was decided in 1874 by the Court of Original Jurisdiction, the Subordinate Judge of Mymensingh, in favor of two co-plaintiffs, Chandermoni Debi and Kalisunderi Debi. In 1876 the High Court, on the appeal of the defendant, Hurrish Chunder Chowdhry, reversing that decision, dismissed the suit (2). In 1878 the original decree made by the Mymensingh Court was restored by the Judicial Committee of the Privy Council. The decree, as originally made and as restored, declared the title of Chandermoni Debi and Kalisunderi Debi, co-plaintiffs in the suit to a certain taluk in the Mymensingh District under the will of Kassiswari Debi, deceased, the validity of whose devise, under a right derived by her from a sanad executed in her favor by her brother, had been disputed by the son of the latter. This son, Hurrish Chunder Chowdhry, defendant in the suit brought by Chandermoni and Kalisunderi, had taken possession; and after the decision of the Subordinate Judge he obtained its reversal by appealing to the High Court. But on an appeal to the Privy Council preferred by Chandermoni's daughters, she being then dead, and Kalisunderi refusing to join in further proceedings, the decree of the Mymensingh Court, in favor of Chandermoni and Kalisunderi, was restored. On this final decision against him, Hurrish Chunder Chowdhry purchased the interest in the taluk which had belonged to Chandermoni from the two appellants, and when the order in Council, following upon the judgment of the Judicial Committee, arrived in India, it came into his hands.

(1) I. L. R., 4 Calc. 23; S. C., L. R., 5 I. A., 138.

(2) 24 W. R., 268.

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Kalisunderi Debi, with a view to enforce the order in Council restoring the original decree which she jointly with Chandermoni had obtained, applied to the Judge in charge of the Privy Council appeals' department of the High Court for an order under s. 610 of Act X of 1877, transmitting for execution or enforcement the order in Council to the Court of Mymensingh.

Hurrish Chunder Chowdhry objected to Kalisunderi's petition for execution: 1st, that it was not accompanied by a certified copy of the order in Council; 2nd, that the decree affirmed by the order in Council could not be executed in part, by one only of the two original co-plaintiffs; whose rights, as between themselves, had not been determined, and were, in fact, in conflict.

This application having been rejected by Pontifex, J., the Judge appointed to dispose of matters relating to appeals to Her Majesty in Council (1), his order was reversed on appeal by a Bench of the High Court (GARTH, C.J., WHITE, J., and MITTER, J.). Both the Puisne Judges held that an appeal would lie from the order in question, and also that the order was wrong. But the Chief Justice, without differing from them as to the latter opinion, *i.e.* in regard to the merits of the order, held that the duties of the Judge in the Privy Council Department being, in respect of transmitting the order in Council under s. 610, only ministerial, his order, refusing to transmit, could not be made the subject of an appeal to the High Court, as it could not fall under s. 15 of the Letters Patent of 1865.

The case on appeal and the judgments are fully reported in I. L. R., 6 Calc., 594.

On this appeal,

Mr. *J. Graham, Q.C.*, and Mr. *J. T. Woodroffe* appeared for the appellant.

Mr. *R. V. Doyne* for the respondent.

For the appellant it was argued that the respondent not having any title to execute this decree, the objection that she had failed

(1) The High Court Rules of 4th June 1867 provide for the appointment of one Judge to dispose of matters relating to appeals to Her Majesty in Council. The Rules of 1st September 1877 refer to him as "the Judge in the Privy Council Department"

to comply with the requirements of s. 610 of the Code of Civil Procedure, as a certified copy of the order in Council did not accompany her petition, must prevail. It was no answer to this that the original order had come into the possession of the appellant, who withheld it. The latter was entitled to insist that the respondent was not in a position to obtain execution of the decree of the Court of first instance, as restored by the order of Her Majesty in Council. To that restoration the respondent, not having appealed, might be a party, but the appellant could rely, on the other hand, on her inability to file the required certified copy; there being also a substantial objection to her obtaining execution of the decree.

[The Registrar here stated the practice in reference to orders of Her Majesty in Council, sent to the Indian Courts after appeals had been disposed of. The original order, when issued, was made over to the agent of the successful party, or parties, who filed it in the Court from which the appeal had been preferred, and a certified copy was kept in England.]

It was also contended that the application for transmission of the order for execution had been rightly refused in reference to the provisions of s. 231 of Act X of 1877, inasmuch as the decree, not having dealt with the rights of the two co-plaintiffs as between themselves, could not be thus executed, *i.e.*, in part, and by the respondent alone. That the respective rights of Chandermoni and Kalisunderi had not been determined was shewn by the concluding words of the judgment in *Bhoobun Mohini Debia* v. *Hurrish Chunder Chowdhry* (1). These were to the effect that it was "unnecessary to decide what the rights of the co-plaintiffs might be, *inter se*." And that their rights might conflict appeared from the nature of their interest in the disputed property. To grant execution to Kalisunderi alone would be to enable her to take a certain share in property in which her interest had not been determined, as against Chandermoni and the representatives of the latter; so that, in effect, it would be to make a material addition to the judgment of the Privy Council. Accordingly the order of Pontifex, J., was right, and this

(1) I L R, 4 Calc, 23.

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application, on the merits, ought not to be allowed. Reference was made to *Abedoonissa Begum* v. *Ameeroonissa Khatoon* (1.)

Also, it was argued, with reference to the difference of opinion among the Judges in the Court below, that whether the order refusing to transmit was right or wrong, and whatever might be the remedy in the latter case, no appeal would lie, from the order made by the Judge, to the High Court. The Judge appointed to dispose of matters relating to appeals to the Privy Council derived his authority through the Statute 24 & 25 Vic., Cap. 104, s. 11, from the Statute 3 & 4 William IV, Cap. 4, s. 21, and the rules made under the latter. The Judge, so acting, did not derive his powers from ss. 9 and 13 of the Statute of Victoria; and, therefore, no appeal from his order would lie under s. 15 of the Letters Patent of 1865. On this point reference was made to *Ananda Mayi Dasi* v. *Purnachandra Roy* (2), and *In the matter of Feda Hossein* (3). Even if, however, the Judge in charge of the Privy Council Department of the High Court could be considered as exercising the powers belonging to the High Court and could be held to be acting in the discharge of duties within the contemplation of the Statute 24 and 25 Vic., Cap. 104, s. 13, and also of the Letters Patent of 1865, s. 15, the latter did not apply so as to authorize an appeal in this kind of proceeding. In this instance the proceeding was ministerial under s. 610 of the Code of Civil Procedure, X of 1877, and was not an order made in the exercise of judicial discretion. Against this order, therefore, no appeal under the 15th section of the Letters Patent of 1865 could lie. On this point were cited *Mowla Buksh* v. *Kishen Pertab Sahi* (4); *Mussamut Amirannissa* v. *Behary Lal* (5). Moreover, even supposing that the right of appeal might have been asserted before the cases in which appeals lay against orders had been exhaustively declared in s. 588 of Act X of 1877, that right no longer remained after the coming into operation of that section, as amended by

(1) L. R., 4 I. A., 66: S. C. I. L. R., 2 Calc., 327.
(2) B. L. R., Sup. Vol., 506; 6 W. R., Mis., 70.
(3) I. L. R., 1 Calc., 431.
(4) I. L. R., 1 Calc., 102.
(5) 25 W. R., 529.

Act XII of 1879. On the subject of the powers of the Indian Legislature to effect the provisions of the Letters Patent of 1865, reference was made to *In the matter of Feda Hossein* (1); *Queen* v. *Meares* (2). Again, s. 591 of Act X of 1877 showed that s. 588 regulated the entire matter of orders appealable under the Code, and no such order as the one in question was appealable to the High Court without express authority, which had not been given.

[At the end of the opening of the appellant's case SIR R. P. COLLIER intimated that their Lordships considered it necessary to hear Counsel for the respondent only on the question whether the order of the 27th of February 1880 was correct or not, in regard to the rights, under the decree affirmed by the order in Council of the 18th April 1878, belonging to the parties entitled to the benefit of that decree; in other words, on the question whether the order of the Judge in the Privy Council Department of the High Court was correct on its merits.]

It was then argued for the respondent that whatever might have been the rights of the co-plaintiffs in the suit as between themselves, it was clear that Kalisunderi was entitled to possession of that moiety of the taluk which fell to her share, as declared; and that whatever rights the appellant as purchaser of the right, title, and interest of the other co-plantiff might have acquired in the share which had been Chandermoni's, still the respondent had a life-interest. There was no ground for holding that the rules governing the execution of decrees were inapplicable; and nothing stood in the way of the enforcement of Her Majesty's order in Council so far as it was in favor of the respondent, on her application under s. 610.

Mr. *J. Graham, Q.C.*, was heard in reply.

At the conclusion of the arguments, their Lordships' judgment was delivered by

SIR R. P. COLLIER.—In order to make the subject of this appeal intelligible a short statement is necessary. In the year 1819 Sumbuchandra by a sanad, conveyed to his sister Kassiswari a certain

(1) I. L. R., 1 Calc., 431. (2) 14 B. L. R., 106.

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taluk. Upon the construction of this sanad, various questions have since arisen. Kassiswari, treating the sanad as having conveyed to her an absolute estate, disposed of it by her will, the material part of which is this: "Of the whole of the rest of the rent-paying and rent-free immovable properties in benami and in my own name, in my possession and not in my possession, in which I have a right and interest, a moiety shall after my death be received by my daughter Chandermoni, and if she adopt a son, by that adopted son, otherwise by her daughters, *i.e.*, by my grand-daughters,"—naming them—"in equal shares; and the children born of their wombs, or adopted by them, shall from generation to generation get their (the grand-daughters') respective shares in the order of succession, and the other moiety shall be received by my daughter-in-law, Srimati Kalisunderi Debi, and if she adopt a son, by that adopted son, and by his children from generation to generation in the order of succession. But the same shall remain in the possession of my daughter-in-law Kalisundori Debi, till the said adopted son shall have attained his majority; and in case there shall be a misunderstanding between him and my daughter-in-law after he shall have attained his majority, the said adopted son and my daughter-in-law, Srimati Kalisunderi Debi, shall receive equal shares" (of the property.) "But, after the death of Kalisunderi Debi, her adopted son, or any surviving lineal heir of her adopted son, shall obtain the same" (her share of the property.)

Upon the death of Kassiswari, the now appellant, Hurrish Chunder, who was the son of Sambhuchandra, took possession of this property; whereupon an action was brought to obtain possession of it by Chandermoni and by Kalisunderi, who were then widows, Kalisunderi having adopted a son, Chandermoni not having made an adoption. The plaint in that action claims possession. It recites the sanad from Sambuchandra the will and the death of the testatrix; and proceeds "In virtue of this will, I, plaintiff No. 1,"—*i.e.* Chandermoni,—"and I, plaintiff No. 2,"—Kalisundori—"on behalf of the minor, have, since her death, become entitled to hold and enjoy all the aforesaid movable and immovable properties." The plaint goes on to state that the defendant had unjustly intruded himself into this

land. The defendant denied most of the allegations in the plaint, among them the adoption of a son by Kalisunderi.

The plaintiffs obtained a judgment and a decree from the Court of first instance; and it is necessary now to determine, as far as possible, what was the precise effect of that judgment. The issues raised were—"(*1st*) Can Kalisunderi prefer this suit jointly with Chandermoni; (*2nd*) Had Kassiswari Debi authority to make a will, and did she make one; (*3rd*) If so, is the will valid, and can the plaintiffs, jointly or individually, prefer the present action for the recovery of the taluk with wasilat; (*4th*) Is it necessary to consider the question of adoption of a son or otherwise in the present action?"

The Judge, after disposing of the first two issues in favour of the plaintiffs, proceeds thus: "Touching the third issue, it is true the original will is not forthcoming, but an attested copy has been filed. I would accept the copy as evidence, as it was attested by the registration authorities, who have the original in their safe custody. The opposite party, I may remark, does not distinctly and emphatically deny the existence of the original will, the execution of which has been substantiated by witnesses." He finds in favour of the will. He proceeds: "But even supposing there was no will executed, yet Chandermoni Debi, as the successor and child of Kassiswari Debi, can sue for the entire taluk; and she herself has no objection to have Kalisunderi as a co-plaintiff; therefore, the plaintiffs can sue in the manner they have." It may be observed that there is no allegation of, or issue upon, Chandermoni's heirship to Kassiswari, and the learned Judge's dictum on the subject is merely obiter. "For the aforesaid reasons it is not necessary to consider the question of adoption of Sharat Chandra Lahiri, the minor. To my mind the plaintiffs can sue upon the will of Kassiswari, the existence and genuineness of which I do not doubt." Their Lordships regard this as, in effect, a suit for the purpose of establishing the will; and the only question to which the issues relate, and which really seems to have been tried, was whether it was valid, comprising the questions whether it was executed, and whether the testatrix had the right to make it. The decree is in pursuance of the judgment, and goes on to affirm: "The plaintiffs

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institute this against the defendant, on the basis of the said will, for the recovery of possession after establishment of their shikmi right," and so on. And it concludes: "That this case be decreed with costs in favour of the plaintiffs, and that the plaintiffs do recover from the defendants possession of the disputed mouzahs and the costs of Court and wasilat from this day until realisation, with interest at the rate of 6 per cent. per annum." It is true that, if the plaint be read with technical strictness, the second plaintiff sues only in right of her adopted son; but it does not seem to have been so understood by the Judge, who meant to give each of the ladies possession of half the property, and declined to try the question of adoption, because, whether the adoption were proved or disproved, Kalisunderi's right to immediate possession remained. Their Lordships are not prepared to say that the Judge was wrong in taking this broader view of the question before him.

An appeal was preferred to the High Court against this judgment, and it was reversed by the High Court on the ground that the testatrix only took an estate for life, and, therefore, was incompetent to dispose of the property by will; but the High Court also treat the action as one brought for the purpose of establishing the validity of the will. The daughters of Chandermoni (she having died before the last-mentioned judgment) appealed to the Queen in Council, and by Order in Council the judgment of the High Court was reversed, and the judgment of the Subordinate Court was affirmed. With respect to the judgment of the Subordinate Judge, their Lordships observe: "No dispute was raised as to the genuineness of the will of Kassiswari, or its validity to pass whatever interest she was capable of devising. The Subordinate Judge gave judgment in favour of the plaintiffs. The grounds of his judgment, which are not very clearly stated, would appear to be that, in his opinion, Chandermoni took an absolute estate under the sanad on the death of her mother; but that, having elected to take under her mother's will and to admit the co-plaintiff to a half share of the estate, both the plaintiffs were entitled to maintain the action against the defendant." Their Lordships also observe that their decision was not intended to conclude any question between the co-plaintiffs.

The judgment of the Queen in Council was sent to India to be executed, but in the meantime the defendant had acquired the interest of the plaintiffs in Chandermoni's moiety, whereupon an application was made to Mr. Justice Pontifex, on behalf of Kalisunderi, who claimed the other moiety, for an execution of the judgment of the Court of first instance as far as that moiety was concerned.

Mr. Justice Pontifex was the Judge appointed under the power, which had been previously conferred by Statute upon the High Court, to execute a portion of their jurisdiction, *viz.*, that which related to enforcing the orders of the Privy Council, and other questions having to do with the relations of the Privy Council to the Courts in India. That learned Judge refused to direct execution under s. 610 of Act X of 1877, which regulates the procedure for enforcing the execution of any order of Her Majesty in Council. That section is to this effect: "Whoever desires to enforce or to obtain execution of any order of Her Majesty in Council shall apply by petition, accompanied by a certified copy of the decree or order made in appeal, and sought to be enforced or executed, to the Court from which the appeal to Her Majesty was preferred. Such Court shall transmit the order of Her Majesty to the Court which made the first decree appealed from, or to such other Court as Her Majesty, by her said order, may direct, and shall (upon the application of either party) give such directions as may be required for the enforcement or execution of the same; and the Court to which the said order is so transmitted shall enforce or execute it accordingly in the manner and according to the rules applicable to the execution of its original decrees." Mr. Justice Pontifex in a short judgment observes: "This is an application for the execution of a Privy Council decree, in part, by one of two plaintiffs. The original Court passed a decree in favour of both the plaintiffs. On appeal to this Court that decree was overruled. One of the plaintiffs only appealed to the Privy Council, and on appeal to the Privy Council the decree of the original Court was restored, and that of this Court reversed. The Privy Council, in their judgment, expressly said they would not decide the rights of the plaintiffs, *inter se*. Subsequently the defendant, who is in posses-

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sion of the property, bought the interest of the appealing plaintiff. The party who did not appeal, having applied to execute the decree, has been met with two objections, the first under s. 610 of Act X of 1877, that that application could not be granted because it was not accompanied by a certified copy of the decree of Her Majesty in Council; but the defendant himself has got that certified copy, and, therefore, I think the objection under s. 610 cannot be sustained."

Their Lordships think it well, before proceeding further, to say that they entirely agree with the learned Judge in this view, which was adopted by the Appellate Court. The practice with respect to the decrees of Her Majesty in Council seems to be this: The original decree is given to the successful party, or to one of the successful parties, to the appeal. That is taken to India, and it is the duty of the person to whom it is given, as he is informed by a written circular, a copy of which has been read, to file that original decree in the High Court of Calcutta. That being done, the proper officer of the Court in Calcutta would be able to give a certified copy, or indeed the Registrar of this Board would be able to do the same. It seems that in this case the defendant got, through Chandermoni, whose interest, as before stated, he had taken, the original order. He neglected to file it, as he ought to have done, in the Court, and it was under those circumstances that Mr. Justice Pontifex held that a copy of that order, though perhaps not a certified copy, might be properly admitted; and their Lordships think he was right. The provisions of s. 610 cannot be construed as restricting the only possible evidence to the certified copy, but as directory words with the object of ensuring that proper information upon the subject of any Order in Council should be supplied to the Courts in India. Mr. Justice Pontifex proceeds: "The other objection to the execution of the decree of the Privy Council was that the decree of the original Court, upheld by the Privy Council, could only be executed as a whole, and not partly by one of the two plaintiffs. Mr. Phillips relies on s. 231 of Act X of 1877. Now the two plaintiffs claim under a will which is not free from difficulty. The Privy Council declined to construe the will as between the two plaintiffs claiming under it. I think, therefore,

I must refuse this application for execution, and the applicant must be left to a regular suit to enforce her claim to any share of the property." From this order or judgment of Mr. Justice Pontifex an appeal was preferred to the High Court. All three of the learned Judges of the High Court, the Chief Justice and and the two Puisne Judges, were of opinion that Mr. Justice Pontifex had exercised a wrong discretion, and that he ought to have sent the case for execution; but the Chief Justice was of opinion that no appeal would lie from the proceeding before him, and that his error could not be set right. The two Puisne Judges were of opinion that an appeal would lie under under s. 15 of the Royal Charter of 1865, which is in these terms: "We further ordain that an appeal shall lie to the said High Court of Judicature at Fort William in Bengal, from the judgment (not being a sentence or order passed or made in any criminal trial) of one Judge of the said High Court, or of one Judge of any Division Court, pursuant to s. 13 of the said recited Act," the said recited Act, with regard to this matter, having enabled the Court to confer upon a Judge, or a division of the Court, the power of the Court itself. These learned Judges held (and their Lordships think rightly) that whether the transmission of an order under s. 610 would or would not be a merely ministerial proceeding, Mr. Justice Pontifex had in fact exercised a judicial discretion, and had come to a decision of great importance, which, if it remained, would entirely conclude any rights of Kalisunderi to an execution in this suit. They held, therefore, that it was a judgment within the meaning of s 15.

The Chief Justice was of opinion that it was not a judgment, and he seems to have based his opinion in a great measure upon the ground that, in his view, Mr. Justice Pontifex had no jurisdiction to inquire at all whether or not Kalisunderi had a right to execution; that his function was merely ministerial; that all he could do, or ought to have done, was to transmit the decree of Her Majesty in Council to the lower Court for execution, that he usurped a jurisdiction which did not belong to him; and that under those circumstances no appeal would lie. Their Lordships do not think that Mr Justice Pontifex can be properly treated as having usurped jurisdiction; but, if he had, this would

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have been a valid ground of appeal, and they are unable to agree with the Chief Justice, that if a Judge of the High Court makes an order under a misapprehension of the extent of his jurisdiction, the High Court have no power by appeal, or otherwise, in setting right such a miscarriage of justice.

It only remains to observe that their Lordships do not think that s. 588 of Act X of 1877, which has the effect of restricting certain appeals, applies to such a case as this, where the appeal is from one of the Judges of the Court to the full Court.

The remaining question is whether Mr. Justice Pontifex was right in refusing to make the order in question; and their Lordships are of opinion that the learned Judge was wrong. They are unable to subscribe to the doctrine that a decree can only be executed as a whole and not partly by one of the plaintiffs—a doctrine, which, as pointed out by the High Court, would lead to the consequence that a defendant could prevent the execution of a decree by buying the interest of one of the plaintiffs. The effect of the judgment which had to be enforced was, in their Lordships' view, as has been already expressed, that the second plaintiff, Kalisunderi, was entitled to possession of half of the estate in question. The defendant had obtained the share of Chandermoni's representatives. As far, therefore, as that share was concerned, he was in no better position to dispute any right the plaintiff might have to execution than Chandermoni herself would have had; and it appears to their Lordships that Chandermoni would have had no right in this suit to dispute the title of the plaintiff to present possession of a moiety of the land. As a defendant he had no better rights. As against the plaintiff he was a wrong-doer; and as against him she had an immediate right to possession. But it has been asserted that he had a right to have the question of the adoption by Kalisunderi determined, and that this question could not be determined in an execution proceeding, to which latter proposition their Lordships assent. But if the adoption were set aside, still Kalisunderi would have a life interest in the property, and could maintain the action in respect of that interest. With this view, as already pointed out, the Judge of first instance found in her favour, declining to try the question of adoption, and it is his judgment which has

now to be executed. Any possible hardship which the defendant might complain of in the present judgment operating as an estoppel against him, or otherwise unfavourably to his trial of this question, should it ever arise, will be obviated by a declaration that the decree is to be executed in respect only of the share to the possession of which Kalisunderi is entitled under and by virtue of the will, and that nothing in this judgment shall affect any right which the defendant may at any time have to question the validity of the adoption.

Their Lordships will, therefore, humbly advise Her Majesty to affirm the judgment of the High Court, coupled with this declaration, and to dismiss this appeal with costs.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Watkins & Lattey.*

Solicitors for the respondent: Messrs. *Barrow & Rogers.*

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Norris.

BASO KOOER AND OTHERS (PLAINTIFFS) *v.* HURRY DASS AND OTHERS (DEFENDANTS)*

1882 *December 6.*

Hindu Law—Mitakshara—Joint family trade—Alienation of ancestral property by some of the members of the family—Interest of adult son affected by sale in execution of a decree against his father—Parties to suit.

A family, governed by Mitakshara law, carrying on a trade in the names of some of its members, having become indebted to the defendants in a large amount in respect of advances made for the purposes of the trade, some of the head members of the family executed a bond in favour of the defendants for the amount due, and hypothecated certain family properties which stood in their names as collateral security therefor. The amount not having been paid on the due date, the defendants brought a suit on the bond against the persons who had executed it, and obtained a decree which, however, did not direct that the properties hypothecated should be sold. In execution of that decree the interest of the judgment-debtors in the hypothecated properties, and in other family properties, were sold, and

* Appeals from Original Decrees Nos. 60 and 61 of 1881, against the decree of Baboo Mohendro Nath Bose, First Subordinate Judge of Mozufferpore, in Tirhoot, dated the 27th December 1880.

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were purchased by the defendants, who, subsequently, under their purchase, obtained possession of the shares of the judgment-debtors and of those of their sons. The decree not having been satisfied by those sales, the defendants brought a suit against the remaining head members of the family to have it declared that their interests in the family properties were liable to satisfy the decree, and that suit also was decreed. Under the last decree the interests in the family properties of the judgment-debtors under that decree were sold, and were purchased by the defendants who subsequently obtained possession of the shares of those judgment-debtors and of the shares of their sons. Some of the sons of the judgment-debtors in both decrees were adult at the time when the suits were instituted. In suits brought, many years after the sales, by members of the family who had not been parties to the previous suits, to recover their shares in the family properties, *held*, that the interests of all the members of the family had passed on the sales.

Per MITTER, J.—There is no distinction in principle between the case of an adult son and that of a minor son as regards a son's interest in ancestral property being liable to pass on a sale of such property in execution of a decree against his father only; but if an adult son proves that he would have been able to save the property by paying off the debt out of his private funds, if he had been a party to the suit, *quære*, whether he should not be allowed to have the sale set aside on payment of the debt due under the decree

A son's interest may pass on a sale of ancestral property in execution of a money decree against his father, but whether it does or does not pass will have to be determined by the circumstances of each case

Delay in bringing proceedings to impeach sales is a matter for consideration in determining what interests pass on the sale.

THE suits out of which these two appeals arose were two of many brought by members of a joint Hindu family governed by Mitakshara law, to recover their shares in the joint family properties which were in the possession of the defendants under purchases at sales in execution of decrees against some of the members of the family.

The facts, and the questions arising in the suits, fully appear in the judgment of the Court.

Mr. *Branson*, and Baboo *Chunder Madhub Ghose* for the appellants.

Mr. *R. E. Twidale*, Baboo *Mohesh Chunder Chowdry*, and Baboo *Dwarkanath Mookerjee* for the respondents.

The judgment of the Court (MITTER & NORRIS, JJ.) was delivered by

MITTER, J.—The plaintiffs in these two suits are members of a joint family of which Chumun Lal was the common ancestor. Chumun Lal left six sons him surviving, *viz.*, Behari Lal, Kanhya Lal, Sheo Lal, Domun Lal, Shoukhi Lal and Amrit Lal; but Amrit Lal may be left out of consideration, as he died without issue leaving a widow Radha Kooer. There was a question raised in the lower Court as to the date of the death of Chumun Lal, but the lower Court has found that it took place in 1262 (1855). We concur in this finding. Of the descendants of the surviving five sons of Chumun Lal, it is sufficient for our purpose to state that Behari Lal had three sons, *viz.*, Bhowani Pershad, Peary Lal and Gopal Lal, and that Sheo Lal had a son named Durga Pershad. In the suit out of which appeal No. 60 arises, the plaintiffs are the widow and sons of Kanhya Lal, and the sons and wives of Bhowani Pershad, of Gopal Lal and of Domun Lal. In the other suit the plaintiffs are sons of Shoukhi Lal, sons and wife of Durga Pershad, and wives of Nuthoo Lal and Gopi Lal who are the sons of Peary Lal. In both these suits one Mohabir Pershad, not belonging to the family, has joined as plaintiff. He is the *benamidar* of one Bunwari Lal, a rich banker in the district of Mozufferpore, who has purchased a share of the disputed property from the other plaintiffs.

It appears that this family carried on a trade of saltpetre in the names of some of its members. The principal defendants in this case, who acted as the bankers of this family for a long time, used to advance money from time to time with which this trade was carried on. On the 26th November 1864 there was an adjustment of accounts between the parties, and the sum of Rs. 24,283-15-6 was found due to the defendants. On that date a cash loan of Rs. 9,716 odd annas 6 pie having been taken by the joint family, a bond for the consolidated amount for Rs. 34,000 was given by the head members of the family to the defendants. This bond was executed by Kunhya Lal, Domun Lal, Bhowani Pershad, and Gopal Lal. The reason for these four persons only executing the bond was that the properties,

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which were hypothecated as collateral security in it, stood in their names. All these properties are situated within the district of Tirhoot.

The money covered by this bond not having been paid on the due date, a suit was brought against these four persons. It was decreed on the 10th February 1866. The Court in its judgment found that the money was taken for the purpose of carrying on the family trade mentioned above. This decree was obtained in the District Court of Patna. There was no direction in it for the sale of the hypothecated properties.

In execution of this decree the properties in dispute in this case, consisting of the hypothecated properties as well as certain properties which had not been hypothecated, were brought to sale in the District Court of Mozufferpore, in the years 1866-67-68. Two of these sales, however, took place so late as in the year 1871. The defendants who became the auction-purchasers in these sales took possession under color of their purchase of the shares of their judgment-debtors as well as of their sons.

The money covered by the decree not having been satisfied, the defendants brought another suit against the head members of the remaining branches of the family, *viz.*, Shoukhi Lal, Durga Pershad, Nuthoo Lal, Gopal Lal, and Gobardhun for a declaration that they were entitled to have the balance of the decree realized by the sale of their property. This suit was decreed in their favor on the 30th June 1868, the Court finding that the original debt, contracted under the bond of 26th November 1864, was binding upon the joint-family. Under this decree the remaining shares of the family properties mentioned above were brought to sale in the years 1868 and 1869. The defendants in these instances also became the auction-purchasers, and, under color of their purchase, took possession of the shares of their judgment-debtors as well as of their sons.

Some of the sons of the judgment-debtors in both these decrees were adults. The present suits were brought in February and March 1879, on the allegation that by these sales only the interests of the persons, who were defendants in these two suits passed, and that the plaintiffs are entitled to recover back their shares from the auction-purchasers. It will have appeared from the dates given

above that the suits were brought in some instances more than 11 years after the auction sales; and in no instance are the dates of the suits less than eight years from the date of the auction-purchase. The lower Court being of opinion that the original debt was binding upon the whole family, and finding that there was long delay in bringing these suits, dismissed them with costs. The lower Court has also found that the majority of the properties in dispute in this case were acquired after the death of Chumun Lal.

In these two appeals nothing has been urged before us as regards the properties acquired after the death of Chumun Lal. With reference to the remaining properties two objections have been taken to the decree of the lower Court: First, that as regards the plaintiffs who had attained their majority before the suits against their fathers were brought (and which suits resulted in the decrees of the 10th February 1866 and 30th June 1866), their shares did not pass by the auction sales; secondly, that as regards properties not hypothecated in the bond of the 26th November 1864, nothing but the interests of the judgment-debtors passed under the auction sales.

With reference to these two grounds, the learned Counsel for the appellants has placed before us all the decided cases bearing upon them, and has contended that the balance of authorities is in favor of the contention raised by him.

The only cases cited in support of the first objection are *Laljee Sahoy* v. *Fakeer Chand* (1), and *Upooroop Tewary* v. *Lalla Bandhjee Sahoy* (2).

The last-mentioned case does not, in our opinion, support this contention. It has rather a contrary tendency. The facts of that case are that a Mitakshara father executed a bond hypothecating a certain ancestral property. He had at that time an adult son. Upon the mortgage bond, a decree was obtained against the father alone, and in execution of that decree the mortgaged property was sold and purchased by the defendant, who, under color of his purchase, took possession thereof. The son then brought a suit to recover possession of his share, and it was held that the mortgage

(1) I. L. R., 6 Calc., 135. (2) I. L. R., 6 Calc., 749

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by the father would not be binding upon the son, unless it was shown that the son had either expressly or impliedly consented to it, and the case was remanded to try that question. It is, therefore, an authority for the proposition that, although an adult son may not have been made a defendant, yet if a particular property were property liable to be sold in execution of the decree which may have been passed against the father, the whole property would pass. This case, therefore, instead of supporting the appellant's contention, goes to show that where a property is liable for the debt contracted by the father, it may be brought to sale in execution of a decree based upon that debt; and that that sale would pass the interest of the son (whether minor or adult), notwithstanding that he was not made a party to the suit in which the decree was passed.

The case of *Laljee Sahoy* v. *Fakeer Chand* (1) does to a certain extent support the appellant's contention. There also a certain ancestral property had been mortgaged by a father, and it was proved that the mortgage had been made with the consent of the son, who was adult at the time of the mortgage. The suit upon the mortgage bond was brought only against the father, and, a decree having been obtained, the ancestral property was brought to sale. The purchaser obtained possession of it, and after nearly the lapse of twelve years the son brought a suit to recover possession of his share.

Mr. Justice Pontifex, in delivering judgment in that case, made the following observations:—

"The result, in fact, seems to be that, *quâ* ancestral property, the son is as equally liable for his father's debts if not incurred for immoral purposes, as for his own debts; but if the interests of an adult son were affected by a decree against the father *alone*, which, in our opinion, is not the law, the unreasonable consequence might be that the son's interest would be more liable for the payment of the father's debt than for the debt and perhaps the prior debt of the son, for no creditors of the son could touch his interest without suing him."

No doubt this passage lends some color to the contention that, in order to affect an adult son, the suit must be brought against

(1) I. L. R., 6 Calc., 135.

him also; but the result of the decision shows that full effect was not given by the learned Judges to the dictum laid down above; for they held that, as the son had stood by and allowed the mortgagee to believe that the mortgage covered the whole sixteen annas of the property, and then allowed him to take possession under his purchase, and to remain in unmolested possession for nearly twelve years, he was estopped from afterwards claiming his share in the property sold.

These observations show that the son was bound by the mortgage, because he had, by his conduct, allowed the mortgagee to believe that the mortgage would affect the whole sixteen annas of the property; but according to the dictum extracted above a decree passed upon a mortgage bond binding upon the son would not affect him unless made a party to the suit. The conduct of the son, therefore, in not bringing a suit for a period of eleven years and upwards, could not make the auction-purchase made by the mortgagee himself extend over the whole sixteen annas of the property if really its legal effect were to convey the father's interest only.

Therefore, although there are certain observations in this judgment which lend some support to the contention of the learned Counsel, the final result of the decision is that the adult son was held bound by the sale which was effected in execution of a decree against the father alone. Therefore the cases cited by the learned Counsel do not support the objection taken by him.

Then, apart from the decided cases, there does not appear to us to be any difference in principle between the cases of adult and minor sons. It has been now conclusively held that an ancestral property in the possession of a father and a son, whether an adult or not, is liable for the father's personal debts, provided that these debts are not proved to have been contracted for immoral purposes. That being the law, it is difficult to understand upon what ground the distinction between the case of an adult and a minor son can be supported.

In the case of an adult son, it may be urged that he ought to be made a party to the suit, because that may enable him, in some cases, to save the family property by paying the debt out of his own private funds, if he be possessed of any. If a case like this be made out by an adult son in any suit, the question may arise

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whether he should not be allowed to have the sale set aside on the payment of the debt due under the decree; but that is not the case here. It is not said here that the adult sons, by reason of their not having been made parties, were deprived of the opportunity of saving the property by paying off the debt.

Beyond this, it does not appear to us that there is any other reasonable ground upon which it can be said that the law should, in the case of an adult son, be different from what it is in the case of a minor son. The first ground taken before us, therefore, is untenable.

As regards the second objection, it seems to us that the balance of authorities is against the contention raised by the learned Counsel.

The cases cited before us in support of this contention are *Ruder Perkash Misser* v. *Hurdai Narain Sahu* (1); *Laljee Sahoy* v. *Fakeer Chand* (2); *Bhagwat Dassa* v. *Gouri Kunwar* (3); and *Ramphul Singh* v. *Deg Narain Singh* (4).

When these cases are narrowly examined, it appears that the only decision which supports the contention is that of *Ramphul Singh* v. *Deg Narain Singh*. In the other three cases it is not broadly laid down that in execution of a money-decree against the father, his interest in the joint property can only be brought to sale. What has been decided in these cases is that, having regard to the circumstances of each transaction forming the basis of each of those suits, what was sold was the interest of the father alone.

The learned Counsel relied very strongly upon the judgment of the Privy Council in the case of *Deendyal Lal* v. *Jugdeep Narain Singh* (5). In the case of *Umbica Prosad Tewary* v. *Ram Sahay Lall* (6), I have gone at some length into this question, and it seemed to me then, as it seems to me now, that what was decided by their Lordships in the Judicial Committee in the case

(1) 5 C. L. R., 112.
(2) I. L. R., 6 Calc, 135.
(3) 7 C. L. R., 218.
(4) I. L. R., 8 Calc., 517.
(5) L. R., 4. I. A., 247: S. C., I. L. R., 3 Calc, 198.
(6) I. L. R., 8 Calc., 898.

of *Deendyal Lal* v. *Jugdeep Narain* was simply this,—that the interest of a member of a joint Hindu family in joint property is liable to be sold in execution of a decree against him. On the other hand, there is a current of decisions showing that, in execution of a money-decree against the father alone, the whole family property may be brought to sale, and that, when such property is sold, the son cannot get the sale set aside, unless he proves that the debt, for which the decree was passed, has been contracted by the father for immoral purposes. See *Jumuk Kishoree Koonwar* v. *Rughoonundun Singh* (1); *Balmokund* v. *Jhoona Lall* (2); *Beer Pershad* v. *Doorga Pershad* (3); *Budree Lall* v. *Kantee Lall* (4); *Anooragee Kooer* v. *Bhugobutty Kooer* (5); *Luchmi Dai Koori* v. *Asman Singh* (6); and *Ponappa Pillai* v. *Poppuváyangar* (7).

Many of these cases are based upon the decision of the Judicial Committee of the Privy Council in the case of *Muddun Thakoor* v. *Kantoo Lall* (8).

It is said that this last mentioned case is only an authority for the proposition that, where a father mortgages ancestral property, the son cannot recover his share of it unless it be shown that the mortgage debt was contracted for illegal purposes.

The observations of the Judicial Committee do not warrant us in taking this narrow view of their decision. All that they say is that it was shown in that case that a Court of Justice had given a decree against him (the father) in favour of the creditor, and that the Court had given an order for the particular property to be put up for sale under the execution. A reference to the Paper Book before the Privy Council will show that the decree was a simple money-decree; that there was no reference in it to

(1) S. D. A., 1861, 213.
(2) S. D. A., N. W. P., 2 Sel. Ca., 469.
(3) W. R. 1864, 310.
(4) 23 W. R., 260.
(5) 25 W. R, 148.
(6) I. L. R. 2 Calc., 213; 25 W. R., 421.
(7) I. L. R, 4 Mad., 1.
(8) L. R. 1 I. A., 321; S. C 14 B L R. 187.

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any mortgage; and that the sale was made in the ordinary way, there being no special directions given for the sale of the whole ancestral property. Then, again, the Judicial Committee expressly confirm the ruling in the case of *Junnuk Kishoree Koonwar* v. *Rughoonundun Singh* (1). In that case there was no sale in execution of a mortgage decree. The sales which were upheld in that case were all sales in execution of simple money-decrees. There is no ground, therefore, for supposing that their Lordships of the Judicial Committee intended that the operation of the principle laid down in the case of *Muddun Thakoor* v. *Kantoo Lall* (2) should be restricted in its application only to sales in execution of decrees based upon bonds, under which ancestral properties are hypothecated.

It being clear, therefore, that in each case it will have to be determined whether the whole ancestral property has been sold, and whether the sale can be impeached by the son or not, there cannot be the least doubt, having regard to the facts of the case before us, that the decrees made by the lower Courts are correct upon the sale proceedings; there is not the slightest doubt that the whole family property was sold. It is also clear that the debts, which were the foundation of the decrees in execution of which the properties were brought to sale, were debts contracted by the heads of the several branches of the joint family for family purposes. Under these circumstances, and especially having regard to the length of time which elapsed between the dates of sale and the dates of the institution of these suits, we are of opinion that the decision of the lower Court is correct. We, therefore, dismiss both these appeals with costs.

Appeals dismissed.

(1) S. D. A., 1861, 213.

(2) L. R., 1 I. A., 321: S. C., 14 B L. R., 187.

Before Mr Justice Wilson and Mr. Justice Maclean.

HURO PRASAD ROY CHOWDHRY (PLAINTIFF) *v.* CHUNDEE CHURN BOYRAGEE AND OTHERS (DEFENDANTS).*

1883 *February* 14.

Enhancement of Rent—Land let for purpose of clearing at certain rent.

When land is let for the purpose of clearing jungle, or other reclamation, and on this ground, or any other ground mentioned in the lease, a reduced rent is provided for the first few years, and it is said that the rent is to be at a certain rate as the full rent, such rent is not liable to enhancement.

Baboo *Rashbehary Ghose* and Baboo *Bhobany Churn Dutt* for appellant.

Baboo *Sreenath Doss* and Baboo *Gyanendro Nath Doss* for respondent.

THE facts of this case sufficiently appear from the judgment of the Court (WILSON and MACLEAN, JJ.) which was delivered by

WILSON, J.—We think that in this case there is no ground for interfering with the decision of the Court below.

The suit was for enhancement of rent of a holding. It appears that the holding of the defendant was a tenure created under a certain amulnama. We must take it, the document itself not being before us, that the terms of that document are correctly stated in the judgment of the lower Appellate Court. It is there stated: "It appears from the rubokaris and amulnama, dated 8th February 1849, that the land of this tenure was originally taken for the express purpose of clearing jungles. It was a khalari land. After the abolition of salt-manufacture, it became covered with jungle. The authorities thought it proper to let it out to the best advantage. As labor and capital must be laid out before this land could be brought into cultivation, it was thought fit to make a jungleburi tenure in favour of the defendants, the maximum rent whereof was fixed at 8 annas per bigha. Under the rulings in *Watson* v. *Joggeshar Attah* (1);

* Appeal from Appellate Decree No. 1301 of 1881, against the decree of Baboo Krishna Mohun Mookerjee, Second Sub-Judge of the 24-Pergunnahs, dated the 21st April 1881, affirming the decree of Baboo Gobind Deb Mookerjee, Officiating Second Munsiff of Diamond Harbour, dated the 28th June 1880.

(1) Marsh. 330.

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Golam Ali v. *Gopal Lal Thakoor* (1); and *Soorasoondery Dabee* v. *Golam Ali* (2), I agree with the Court below in holding that this tenure is not liable to enhancement under the Rent Law."

Now, the question is shortly this: When land is let for the purpose of clearing jungle or other reclamation, and on this ground, or any other ground mentioned in the lease, a reduced rent is provided for the first few years, and it is said that the rent is to be at such and such rate, a sum as the full rent—does that mean, as the words seems to import, that the full rent is to be the full rent as long as the tenure subsists, or is such a rent liable to enhancement under the provisions of the Rent Law? We agree with the lower Appellate Court in thinking that the decision of the Privy Council in *Soorasoondery Dabee* v. *Golam Ali* (2) is an authority for holding that the former view is the true one, and that in the present case that rent cannot be enhanced.

This appeal is dismissed with costs.

Appeal dismissed.

1883 *February* 20.

Before Mr. Justice Wilson and Mr. Justice Maclean.

PROTAP CHUNDER CHUCKERBUTTY, (AUCTION-PURCHASER) *v.* PANIOTY, (DECREE-HOLDER) AND ANOTHER (JUDGMENT-DEBTOR.)*

Sale in execution of decree—Setting aside sale—"Saleable Interest"—Civil Procedure Code (Act XIV of 1882) *s.* 313.

The fact that property sold in execution of a decree is subject to a mortgage upon which a decree has been obtained, which fact is not disclosed prior to the proclamation of sale, is not sufficient to enable an auction-purchaser to set aside the sale on the ground that the judgment-debtor had "no saleable interest" in the property, within the meaning of s. 313 of the Civil Procedure Code.

Naharmul Marwari v. *Sadut Ali* (3), distingushed.

THIS was an application by an auction-purchaser to set aside the sale of a property sold in the execution suit on the ground that the right, title and interest of the judgment-debtor in the property had been mortgaged by him to one Iswar Chunder

* Appeal from Original Order No. 379 of 1882, against the order of Baboo Aditya Chunder Chuckerbutty, Officiating Second Munsiff of Putooakhally, dated the 30th September 1882.

(1) 15 B. L. R., 125 : S. C. 19 W. R., 141. (2) 9 W. R., 65.
(3) 8 C. L. R., 468.

Shaha, who had obtained a decree on the mortgage, and that the fact of the mortgage was not revealed in the affidavit which was filed on behalf of the decree-holder prior to the proclamation of the sale. The Munsiff held that this was not a sufficient ground for an auction-purchaser to set aside a sale, considering that some rights remained in the judgment-debtor, and that therefore it could not be said that he had "no saleable interest" within the meaning of s. 313 of the Civil Procedure Code.

The auction-purchaser appealed to the High Court.

Baboo *Rash Behary Ghose* for the appellant.

Baboo *Huro Mohun Chuckerbutty* for the respondents.

The judgment of the Court (WILSON and MACLEAN, JJ.) was delivered by

WILSON, J.—We think there is no ground for interfering with the order made in this case. The question is whether the Court below ought to have set aside the sale in execution under the terms of s. 313 of the Procedure Code. That section says: "The purchaser at any such sale may apply to the Court to set aside the sale, on the ground that the person whose property purported to be sold had no saleable interest therein." It is said in this case that the judgment-debtor had no saleable interest in the property, on the ground that the property had been mortgaged, and that before the sale to the present appellant a decree in a suit on the mortgage had been obtained. We are not prepared to lay down broadly the proposition that wherever there is a mortgage on the property and a mortgage decree has been obtained there is no saleable interest in the judgment-debtor. We are asked so to hold on the authority of the case of *Naharmul Marwari* v. *Sadut Ali* (1). We do not understand that the Court there intended to lay down any such proposition. That case was a peculiar one in its circumstances, and the order made was a very special one. The Court did not set aside the sale as between the purchaser and the decree-holder. It set aside the sale so far as to protect the purchaser, who, by reason of the mortgage, had perhaps obtained no profitable interest in the property from having to pay the balance of his

(1) 8 C. L. R., 468.

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PROTAP CHUNDER CHUCKERBUTTY v. PANIOTY.

purchase-money, after satisfying the decree-holder's claim, into the pocket of the judgment-debtor himself. That is a very different case from the present one, which is a case between the decree-holder and purchaser, and not a case between the judgment-debtor and the purchaser. That case, therefore, appears to us not to govern this case.

The appeal will be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Mitter and Mr. Justice Field.

1883 *February* 21.

JUTADHARI LAL (DEFENDANT) *v.* RUGHOOBEER PERSAD AND OTHERS (PLAINTIFFS).*

Costs—Liability of shares of members of Joint-family for.

Pending an appeal, the plaintiff, who was the appellant, died, leaving one adult and four minor sons. The adult son prosecuted the appeal, which was dismissed, as was the suit in the Court below, with costs. The decrees for costs were sold by the defendant to a third person, who caused certain property which belonged to the estate of the plaintiff to be sold in execution. *Held*, in a suit by the minor sons to recover possession of the shares in the property sold, that as all the sons were interested in the litigation all their shares were liable for the costs, and the suit was dismissed.

THIS was a suit to recover possession of certain lands. It appeared that one Jubhoo Lal Sahoo brought a suit against one Dukhit Sahoo for possession of a house and for rent. This suit was dismissed with costs. Jubhoo Lal Sahoo appealed, but died before the appeal was heard. His eldest and only adult son, Mohabeer Persad, prosecuted the appeal, which was dismissed with costs. Dukhit Sahoo sold the decree for costs to one Jutadhari Lal. The property, the subject of the present suit, was sold in execution of the decree, and was purchased by Jutadhari Lal. The present suit was brought by the four minor sons of Jubhoo Lal Sahoo against Jutadhari Lal, Dukhit Sahoo and Mohabeer Persad to recover four-fifths of the property sold, on the ground that, as they had not been represented upon the appeal or in the execution proceedings, their shares in the property did not pass to the pur-

* Appeal from Appellate Decree No. 2320 of 1881, against the decree of Baboo Kali Prosunno Mukerji, Second Sub-Judge of Sarun, dated the 11th November 1881, reversing the decree of Baboo Tara Prosunno Banerjee, Sudder Munsiff of that district, dated the 28th June 1880.

chaser, but only the share of Mohabeer Persad. The plaint contained the usual charges of fraud and collusion between the defendants. The Munsiff found that these charges were not proved, and held that the whole of Jubhoo Lal Sahoo's share passed under the sale, and dismissed the suit. The Subordinate Judge reversed the Munsiff's decision, holding that the share of Mohabeer Persad alone could be affected by the execution proceedings. The defendant Jutadhari Lal appealed to the High Court.

Baboo *Mohesh Chunder Chowdry* for the appellant.

Baboo *Saligram Singh* for the respondents.

The judgment of the Court (MITTER and FIELD, JJ.) was delivered by

MITTER, J.—The plaintiffs are the minor sons of one Jubhoo Lal Sahoo. It appears that Jubhoo Lal Sahoo had brought a suit against the defendant No. 2 in this case, *viz.*, Dukhit Sahoo, for recovery of possession of a house and for recovery of the rent due on account of that house. This suit was dismissed on the 9th of October 1874, and Jubhoo Lal was made liable for costs. Against that decree Jubhoo Lal preferred an appeal, and while that appeal was pending Jubhoo Lal died. The appeal was then prosecuted by Mohabeer Persad, who was the sole adult son of Jubhoo Lal, the other two sons, the plaintiffs in this case, being minors. The appeal was dismissed, and the appellant was made liable for costs. The decrees for costs passed by the Court of first instance as well as by the Court of appeal, having been sold by the defendant No. 2 to the defendant No. 1, Jutadhari Lal, the appellant before us, they were executed, and the property now in suit was sold in execution, and purchased by Jutadhari Lal himself. The present suit was brought to recover the share of the plaintiffs in the property sold, on the ground that they not having been represented either in the Appellate Court or in the execution proceedings their shares were not affected by the sale; what passed under it was the share of Mohabeer Persad alone, who prosecuted the appeal, and against whom alone the execution proceedings were taken. There is no doubt in this case that one of the decrees was against Jubhoo Lal himself. It is also the fact that Jubhoo Lal had himself preferred the appeal which was subsequently dismissed,

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it having been prosecuted after his death by his adult son, Mohabeer Persad. The original suit related to a certain property appertaining to the estate of Jubhoo Lal, and if the appeal had succeeded the plaintiffs would have shared in the benefit arising from that success. Under these circumstances, it is but just to hold that Mohabeer Persad prosecuted the appeal as the representative of the joint family, consisting of himself and his minor brother, who were all interested in the result of that litigation. This is precisely the view which was taken under similar circumstances by their Lordships of the Privy Council in the well-known case of *Bissessur Lal Sahoo* v. *Luchmessur Sing* (1). That being so, it seems to us clear that the view of the rights of the parties taken by the Court of first instance is correct; what was sold was the property of Jubhoo Lal, who was the real debtor. That he was the real debtor so far as the decree of the first Court is concerned admits of no doubt; and, having regard to the circumstances of the case, it seems to us that, as to the costs of the Appellate Court, the real debtor was also Jubhoo Lal, that is to say, that his estate was liable for these costs. The lower Appellate Court, in deciding in favour of the plaintiffs, relied upon the Full Bench decision in *Assamathem Nessa Bibee* v. *Roy Lutchmeeput Singh* (2). That case seems to us to be distinguishable from the present in many ways, but the principal and most striking distinction that appears to us is this: There the original debtor was a Mahomedan, and the persons who were sued in that case after the death of the original debtor could not, as in a Hindu family, be said to have represented the particular heir whose name was left out. It is sufficient to refer to this distinction in order to show that the principle laid down in that case cannot apply to the present case.

On the whole, we are of opinion that in this case what was sold was the property of Jubhoo Lal.

We therefore set aside the decree of the lower Appellate Court and restore that of the Munsiff with costs.

Appeal allowed.

(1) L. R., 6. I. A., 233. (2) I. L. R., 4 Calc., 142.

Before Mr. Justice Cunningham and Mr. Justice Maclean.

SRINATH DUTT (JUDGMENT-DEBTOR) *v.* GOPAL CHUNDRA MITTRA AND OTHERS (DECREE-HOLDERS.)*

1883 *March* 14

Sale in execution of decree—Debt secured by mortgage of immovable property—Civil Procedure Code (X of 1877), s 266.

A debt secured by mortgage of immovable property cannot be sold in execution of a decree under the provisions of the Civil Procedure Code applicable to movable property.

In this case in execution of a decree obtained by Gopal Chundra Mittra, the interest of Srinath Dutt, one of the judgment-debtors in certain property which had been mortgaged to him by one Ugendro Nath Dutt, was sold as movable property. Srinath Dutt applied to have the sale set aside on the ground that his interest, involving as it did an interest in immovable property, was not a debt such as could be sold under the provisions of the Civil Procedure Code relating to movable property.

The District Judge refused the application. He said: "The argument by which this debt is sought to be converted into immovable property is, so far as I understand it, this: that according to the Transfer of Property Act a mortgage is a transfer of an interest in immovable property; that under the Limitation Act "immovable property" includes any interest arising out of land, and also in Article 144 puts any interest in immovable property on exactly the same footing as immovable property itself in respect of limitation. The fallacy in this argument I think consists in looking upon a debt which is secured by the pledging of land as a benefit arising out of that land. Properly viewed it is an incumbrance on the land. For special purposes of limitation it may be advisable to put such an interest on the same footing as immovable property, but this does not make them both the same thing. A debt remains a debt, however much it may be hedged round with safeguards and conditions, some of them involving land. The language of s. 266 of the Civil Procedure Code on this point is clear; it speaks of bonds

* Appeal from Original Order No. 319 of 1882 against the order of J P. Grant, Esq, Judge of the 24-Pergunnahs, dated the 7th July 1882.

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or other securities for money, thus clearly contemplating a mortgage bond."

The District Judge accordingly dismissed the application.

Srinath Dutt appealed from that decision to the High Court.

Baboo *Bhabany Churn Dutt* for the appellant.

Baboo *Bhubun Mohun Doss* for the respondents.

The judgment of the Court (CUNNINGHAM and MACLEAN, JJ.) was delivered by

CUNNINGHAM, J.—The question to be decided in this appeal is whether a debt secured by mortgage of immovable property has been rightly sold in execution of decree, under the provisions of the Civil Procedure Code applicable to movable property.

The learned Judge below has regarded it merely as a debt, and has held that it was rightly sold as movable property. We feel some difficulty in adopting this view. A mortgage is not merely a debt, it represents a substantial interest in the mortgaged property, *viz.*, the right of selling it, under certain conditions, in realization of the debt. It is obvious that if the debt alone, apart from the security, is sold in execution, the full value of the mortgage will not be realized. The case does not appear to be expressly provided for by the Code. We think that in such cases there should be an attachment under s. 274 as well as under s. 268. In the present case as the debt alone was sold a material irregularity producing substantial injury to the judgment-debtor appears to have occurred, and the sale must be set aside under s. 311, and the purchase money refunded under s. 315.

The appeal must be decreed with costs.

Appeal allowed.

APPELLATE CRIMINAL.

Before Mr. Justice Mitter and Mr. Justice Field.

RONGAI AND OTHERS *v.* THE EMPRESS.*

1883
Feby. 27.

Practice—Repeal of Act—Appeal to High Court—Code of Criminal Procedure, Act X of 1872, *s.* 36—*Act X of* 1882, *s.* 408—*High Court, Revisional Jurisdiction.*

On the 9th of December 1882, a person was convicted under ss. 457 and 109 of the Indian Penal Code, and sentenced to three years' rigorous imprisonment by a Deputy Magistrate of Assam, exercising special powers under s. 36 of the old Code of Criminal Procedure, Act X of 1872. The new Code of Criminal Procedure came into force on the 1st of January 1883. The prisoner presented an appeal to the High Court from the conviction and sentence above mentioned on the 23rd of January 1883.

Held, by FIELD, J, (MITTER, J., expressing no decided opinion) that the case was governed by s 408 of the new Code of Criminal Procedure, and that no appeal lay to the High Court.

Held, by the Court, that the case was a fit one for the exercise of the High Court's Revisional Jurisdiction, and should be dealt with under the powers conferred on the High Court by virtue of that jurisdiction.

IN this case the prisoners were charged by the Deputy Commissioner of Assam with having committed offences under s. 457, ss. 457 and 109, and s. 411 of the Indian Penal Code. The charges were proved to the satisfaction of the Deputy Commissioner, who sentenced the prisoners to three years' rigorous imprisonment on the 9th of December 1882. The Deputy Commissioner was invested with powers under the provisions of s. 36, Act X of 1872. The prisoners appealed to the High Court on the 23rd of January 1883.

Baboo *Hurry Mohun Chuckerbutty* for the appellants.

The following judgments were delivered.

MITTER, J.—In this case three persons—Rongai, Gouri Khan and Beerai—were convicted under s. 457, coupled with s. 109, by an officer exercising the special powers vested in him under s. 36, Act X of 1872. They were each of them sentenced to three

* Criminal Appeal No. 40 of 1883, against the order of H. J. Peet, Esq, Deputy Commissioner of Luckimpore, dated the 9th December 1882.

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years' rigorous imprisonment on the 9th of December last. An appeal was presented to this Court on the 23rd of January last, and on the appeal coming on for hearing before a Division Bench of this Court on the same day, the following order was passed :— "The appeal is admitted, send for the record and issue the usual notices." The case being now called on before us to be heard finally a question has arisen,—whether this Court is competent to hear this case as an appeal against the conviction and sentence of the lower Court. It appears, with reference to the provisions of the old Code, that the provisions of the old Code and those of the new Code are not precisely the same. Under the old Code the test which determined the venue of appeal in cases like the present was whether the officer in the lower Court exercised the special powers mentioned in s. 36. In this case it is clear that the Deputy Commissioner against whose judgment this appeal has been preferred, was exercising the special powers vested in him under s. 36 of the Code of 1872. As Magistrate he could not pass the sentence which was passed in this case, and it is also apparent on the proceedings that he was exercising the special powers under that section. That being so, it is quite clear that under the old Code the appeal lay to this Court, but under the new Code the right of appeal to this Court is restricted only to those cases in which the sentence passed by officers of this description, *viz.*, officers vested with special powers under the provisions of s. 36, requires confirmation by a superior Court. Then, whether under the old Code or under the new Code, it is quite clear that the sentence which was passed in this case did not require confirmation by a superior Court. That being so, it is also quite clear that if the new Code applies, the appeal in this case would not lie to this Court. The last section of the new Code provides that all pending proceedings would be governed by it, and if the present case could be considered as a case pending on the 1st of January 1883, no doubt the new Code would have applied ; but, as already stated, the case was disposed of in the lower Court on the 9th December 1882. On the other hand, by s. 2 of the new Code, Act X of 1872 having been repealed, and this appeal having been preferred on the 23rd of January, the appellants could not claim any right of appeal which they had under the old Code,

as that Code was not in force on that day. The section which deals with the right of appeal under the new Code is s. 408, and that section is to the following effect: "Any person convicted on a trial held by an Assistant Sessions Judge, a District Magistrate or other Magistrate of the first class, or any person sentenced under s. 349 by a Magistrate of the first class, may appeal to the Court of Session. Provided that "(a), when in any case an Assistant Sessions Judge or a District Magistrate passes any sentence which is subject to the confirmation of the Court of Session, every appeal in such case shall lie to the High Court." The section says generally that any person convicted on trial by the officers abovementioned may appeal to the Sessions Judge, and in certain cases to the High Court. Therefore, I am inclined to think that the right of appeal in this case would be governed by the provisions of the new Code. That being so, the appellants, as a matter of right, would not be entitled to appeal to this Court; but it seems to me that it is not essentially necessary in this case to decide this question, because whether the appeal lies to the Sessions Judge or to this Court, this seems to be a fit case for the exercise of the revisional powers given to us by the new Code. It is, therefore, not necessary for me to express a decided opinion on this point, but treating the case whether as an appeal or under the revisional powers vested in this Court, it seems to me that the conviction of the lower Court cannot stand.

[His Lordship having gone through the evidence said]:—

On the whole I do not think that the evidence is sufficient to support the conviction of the prisoners. We accordingly set it aside and direct their immediate release.

FIELD, J.—In this case the appellants were convicted on the 9th of December last by a Deputy Commissioner in Assam exercising the special powers which could be conferred under s. 36 of the Code of Criminal Procedure, Act X of 1872. That the Deputy Commissioner as District Magistrate was exercising these powers appears on the face of these proceedings, and with reference to the provisions of s. 270, Act X of 1872, it is also clear that the District Magistrate was exercising these powers because it appears from the sentence awarded, *viz.*, three years' rigorous imprisonment, that such officer was exercising such

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special powers. As District Magistrate the Deputy Commissioner could only have passed a sentence of two years' rigorous imprisonment. This being so, it is clear that under the provisions of s. 270, just referred to, the appeal lay to the High Court, and not to the Court of Session. But it is to my mind clear that the present Code, Act X of 1882, has altered the law. Section 408 of the present Code enacts thus generally: "Any person convicted on a trial held by an Assistant Sessions Judge, a District Magistrate or other Magistrate of the first class, or any person sentenced under s. 349 by a Magistrate of the first class, may appeal to the Court of Session, provided that when in any case an Assistant Sessions Judge or a District Magistrate passes any sentence which is subject to the confirmation of the Court of Session, every appeal in such a case shall lie to the High Court." Now it is clear to my mind that the words "District Magistrate" here include a District Magistrate vested with special powers under s. 30 of the present Code. It is, therefore, clear that all cases tried by a District Magistrate so vested are, as a general rule, appealable to the Court of Session, unless in any particular case the sentence, being subject to the confirmation of the Court of Session, is appealable to the High Court. Now the sentence passed in the present case is a sentence of three years only; that sentence, according to the old law, and to the new law, did not and does not require confirmation, and therefore it is clear to my mind that under the words of the present Code the appeal in this case lay to the Court of Session, because the sentence passed was not subject to the confirmation of the Court of Session. The appeal was presented to the High Court after the 1st of January, and the question arises whether the High Court has jurisdiction to entertain the appeal so presented. It appears to me that the High Court, as a Court of Appellate Jurisdiction, cannot entertain this case as an appeal. Section 558 of the present Code relates to pending cases. Now this was not a pending case, and, therefore, it does not come within the purview of that section. Then it is contended that s. 6 of the General Clauses Act, I of 1868, will apply. It appears to me that this appeal cannot, within the meaning of that section, be termed a proceeding commenced before the repeal of Act X of 1872. The

proceedings on the original trial terminated on the 9th of December. The proceeding before us is an appeal, and no such proceeding was commenced before us on the 1st of January. That being so, it appears to me that the case must come under the general language of s. 408, *viz.*, that any person convicted on a trial held by a District Magistrate may appeal to the Court of Session. That language is general; it is in no way restricted to persons convicted after the Code came into operation, and it is sufficiently wide to include the cases of persons convicted before the new Code came into force. This being so, I am of opinion that the appeal in the present case ought to have been made not to the High Court but to the Court of Session. I am, however, quite of opinion with my learned colleague that having regard to the distance of Assam from Calcutta, having regard to the mistakes that may probably be committed upon a change in the law, and moreover having regard to the facts of this particular prosecution, it is a proper case in which to exercise the revisional jurisdiction of this Court. This being so I have concurred in hearing this case as a case taken up for revision. As to the remarks on examination of the evidence, and generally on the merits of the case which have just been made by my learned colleague, I entirely agree, and I think that these appellants must be acquitted and discharged.

Convictions set aside.

APPELLATE CIVIL.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Mitter.

RAMKRISTO DASS (PLAINTIFF) *v.* SHEIKH HARAIN (DEFENDANT).*

1882
December 22.

Suit for Rent—Landlord and Tenant—Registered owner, Suit by where the relationship of landlord and tenant is not shown to exist—Beng. Act VII of 1876, s. 78.

The mere fact of a person being registered under the provisions of Beng. Act VII of 1876 as proprietor of the land in respect of which he seeks to recover rent is not sufficient to entitle him to sue for it.

* Appeal under s. 15 of the Letters Patent against the decree of Mr. Justice O'Kinealy, dated the 13th September 1882, in Appeal from Appellate Decree No. 1549 of 1881.

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Where a landlord who was registered as owner of the land in respect of which he claimed rent, sued the occupier for such rent, but was only able to prove the fact that he was the registered owner, and was unable to show that the relationship of landlord and tenant existed, or that he had a good title to the estate of which he was the registered owner:

Held, that the suit was rightly dismissed.

THIS was an appeal under s. 15 of the Letters Patent against the decree of Mr. Justice O'Kinealy. The plaintiff in this and some analogous suits sued for arrears of rent in respect of the years 1283 to 1285 (1876—1878) for lands situate in a certain talook No. 170, of which he was registered as owner. The defendant denied that the relation of landlord and tenant existed, and alleged that for the particular lands for which the rent was claimed he paid rent to a third party named Omakant.

The Court of first instance decreed the suit, but the Subordinate Judge on appeal, holding on the evidence on the record that the relationship of landlord and tenant did not exist, reversed that decree and dismissed the suit.

The plaintiff then preferred a special appeal to the High Court, and on the hearing of the appeal before Mr. Justice O'Kinealy it was contended that inasmuch as the plaintiff had got his name registered in respect of the land, the defendant holding the land was bound to pay him rent without any contract, express or implied, and that he could sue him for rent. Mr. Justice O'Kinealy, however, held that if the relationship of landlord and tenant did not exist, the suit could not be maintained merely from the fact that he was the registered owner. It was further contended in special appeal that the Courts below should have decided whether the land in question lay within plaintiff's lands or within the boundaries of the chak belonging to Omakant; but the Court held that it was quite unnecessary to enter into the question of the plaintiff's title as against a party not on the record, when the other finding was sufficient to dispose of the suit.

Several other questions were raised on behalf of the plaintiffs on Special Appeal, which are immaterial for the purposes of this report, and the Court after disposing of them held that on the facts, as proved, there was nothing to show that the relationship of landlord and tenant existed, and accordingly dismissed the appeal.

The plaintiff accordingly preferred the present appeal.

Baboo *Omakali Mukerjee* appeared for the appellant.

Baboo *Jogesh Chunder Rai* for the respondent.

The judgment of the Court (GARTH, C.J., and MITTER, J.) was delivered by

GARTH, C.J.—The plaintiff is the registered owner of a revenue-paying estate under Beng. Act VII of 1876, and in this and other analogous cases he sues certain tenants of that estate to recover rent for the lands which they hold; and for the purposes of the question, which we have to determine, we must assume that he has proved no title to the rent which he claims, beyond the mere fact that he is the registered proprietor. The question is, whether that fact alone entitles him to recover rent from the defendants.

The Court of first instance considered that it did; but the Subordinate Judge and the learned Judge of this Court have both decided against the plaintiff. He now appeals to us relying on the language of s. 78 of Beng. Act VII of 1876.

That section says that "no person shall be bound to pay rent to any person claiming such rent as proprietor or manager of an estate or revenue-free property in respect of which he is required by this Act to cause his name to be registered, or as mortgagee, unless the name of such claimant shall have been registered under this Act."

It is contended that under the provisions of that section the registered owner of a revenue-paying estate has a right to sue the tenants for rent, although he has not entered into any contract with them, and although he cannot prove a good title to the estate of which he is the registered owner.

We think that the section does not say or mean anything of the kind. It is true that the owner of the estate cannot sue for rent, *unless he is registered*; but it by no means follows, that one who is not the true owner, can sue because he is registered.

This point is very clear, and has been decided by this Court on several previous occasions.

Speaking for myself I heartily wish it were the law, that the registered owner, and the registered owner only, was entitled to sue

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the tenants for rent; and that, not only as regards revenue-paying, but all other estates.

Unfortunately, however, that is not the law at present; and we must therefore dismiss this appeal with costs.

It is admitted that the appeals, numbered 1550 to 1553 inclusive, will be governed by this decision. Those appeals, therefore, are also dismissed with costs.

Appeal dismissed.

FULL BENCH REFERENCE.

Before Sir Richard Garth, Knight, Chief Justice, Mr. Justice Mitter, Mr. Justice McDonell, Mr. Justice Prinsep and Mr. Justice Wilson.

1883 *March 9.*

ULFATUNNISSA *alias* ELAHIJAN BIBI (DEFENDANT) *v.* HOSAIN KHAN (PLAINTIFF)

Registration Act III of 1877, *s.* 49—*Unregistered bond—Evidence—Mortgage.*

An unregistered bond, containing a personal undertaking to repay money borrowed, and also a hypothecation of land above Rs. 100 in value as security, may be used in evidence to enforce the personal obligation.

THIS was a suit for money lent and interest. The plaintiff alleged that the defendant had borrowed from the plaintiff the sum of Rs. 2,500 on the 3rd of February 1878, and that on the same date she executed a bond, whereby she promised to pay the money within a year. The bond had been lost by the plaintiff before the institution of the suit, but on the trial secondary evidence of its contents was given by one of the plaintiff's witnesses, who is thus referred to by the lower Appellate Court: "He drew up a draft of the plaint to be filed with the bond before it was lost, and was plaintiff's adviser at the time. He is therefore in the best position of all the witnesses to speak as to its contents. He says the bond contained these words: "I promise to pay the amount of the bond peaceably আদায়—if not, you will sell the property which is mortgaged, and you may then proceed

* Full Bench Reference made by Mr. Justice Wilson and Mr Justice Field, dated the 6th September 1882, in appeal from Appellate Decree No. 690 of 1881.

against my other property." The defendant contended that the bond should have been registered, and, that not having been done, submitted that the plaintiff's suit should be dismissed. The Court of first instance gave the plaintiff a decree which was affirmed on appeal, the Judge citing *Mattongeney Dossee* v. *Ramnarain Sadkhan* (1), and *Krishto Lal Ghose* v. *Bonomalee Roy* (2). The defendant appealed to the High Court on the ground (*inter alia*) that the lower Appellate Court was wrong in holding that the bond was legally admissible as evidence in the case. The case came on for hearing before a Division Bench of the High Court (WILSON and FIELD, JJ.) who referred the point for the decision of a Full Bench, with the following remarks:

WILSON, J.—The main question raised in this appeal is one upon the construction of s. 49 of the Registration Act (III of 1877).

The instrument sued on was not produced; but the loss having been proved, secondary evidence was given of its contents. The exact terms of the document do not appear; but the witnesses all agree that the document, which they call a bond, contained an acknowledgment of a loan of Rs. 2,500, a promise to repay the amount, and a mortgage of immovable property to secure it.

The suit is a personal suit to recover the money. And the question is, whether the document can be given in evidence in support of such a personal claim, it not having been registered.

Section 49 says: "No document required by s. 17 to be registered shall affect any immovable property, or confer any power to adopt, or be received as evidence of any transaction affecting such property or conferring such power."

The whole question appears to turn upon the meaning of the word *transaction*. Where under one contract and for one consideration two obligations are undertaken, one affecting land and the other not, is the whole one transaction within the meaning of the section? Or may it be said that there are two distinct transactions, provided the obligation which does not affect land

(1) I. L. R., 4 Calc., 83. (2) I. L. R., 5 Calc., 611.

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be both intelligible and capable of performance without reference to the other which does?

Apart from authority, I see great difficulty in saying that the transaction means anything but the whole bargain. It is a familiar rule of construction that words not of a technical nature are to be understood in their ordinary and natural sense unless a reason to the contrary appear; and I rather think that anyone, not a lawyer, who had borrowed money on mortgage, and executed a mortgage bond, would be surprised if he were told that he had been engaged in two separate transactions. And the difficulty is increased by the words that precede,—which say that "no document required by s. 17 to be registered shall affect any immovable property." If the later words be read in such a sense as to make the word 'transaction' mean such part of the bargain as relates to land, it is not clear to my mind how they are to have any operation at all, or how they can apply to any case not already covered by the previous words.

The authorities bearing upon the question appear to stand thus: In Act XX of 1866, s. 49, the words of the enactment were: "No instrument required by s. 17 to be registered shall be received in evidence in any Civil Proceeding in any Court, or shall affect any property comprised therein" unless registered. Upon these words a Full Bench of this Court held that all that was forbidden was the reception of the document "in evidence as a document affecting an interest in land"—*Lachmiput Singh Dugar* v. *Mirza Khairat Ali* (1). The same view was taken by the Madras High Court in *Vallaya Padayachy* v. *Moorthy Padyachy*, (2). The Bombay High Court followed these rulings, though in the first instance without wholly approving them, in *Tukaram Vithoji* v. *Khandoji Malharji* (3); and *Sangappa Bin Ningappa* v. *Basappa Bin Parappa*, (4). The section under which these cases were decided deals only with the effect and admissibility of the instrument, and says nothing about the transaction.

The language of s. 49 in the Act of 1871 was the same as that of the present Act. Under these Acts four cases, so

(1) 4 B. L. R., (F. B.), 18.
(2) 4 Mad. H C, 174.
(3) 6 Bom H C. O. C., 134
(4) 7 Bom. H. C. A. C., 1.

far as I am aware, have been decided. The case of *Raju Balu* v. *Krishnarav Ramchandra* (1) came before Green, J. That was a suit for damages for breach of a covenant contained in a document which also conveyed land. The learned Judge held that, even assuming the covenant not itself to affect land, yet, inasmuch as it could not be construed without referring to the conveyance, effect could not be given to it. The question whether a term not affecting land, if intelligible and capable of performance separately, could be enforced, did not arise. The case of *Mattongeney Dossee* v. *Ramnarain Sadkhan* (2) came before Garth, C.J., and Markby, J. The bond was somewhat singularly worded, and some doubt was expressed whether it contained a personal promise to pay. But assuming that it did, the Court said: "In this case the document is not divisible. It discloses one transaction only, and that the transaction which the plaintiff must necessarily prove for the purpose of making out his case." And again it is said: "The transaction was one and indivisible." In that case I understand the Court as meaning by "the transaction" the whole bargain.

The case of *Krishto Lal Ghose* v. *Bonomalee Roy* (3) came before Mitter and Tottenham, JJ. In that case again there was a bond containing a covenant to repay a sum of money borrowed and a mortgage to secure it. It was held that the two things were separable, and that the money might be recovered. That decision seems to me to involve the view, that *transaction* means not the bargain, but that term of the bargain which affects land.

It is true that the learned Judges who decided that case distinguish it from that before Garth, C.J., and Markby, J.; but I feel great difficulty in seeing the distinction with sufficient clearness to enable me to say with confidence under which authority the present case falls.

In the case of *Sheo Dial* v. *Prag Dat Misser* (4), a similar question came before a Full Bench of the Allahabad High Court. The defendant had executed a bond by which he

(1) I. L. R., 2 Bom., 273.
(2) I. L. R., 2 Calc., 33.
(3) I. L. R., 5 Calc., 611.
(4) I. L. R., 3 All., 229.

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bound himself to pay a sum of money borrowed, and hypothecated land as security. The Court held that the plaintiff could sue for the money, though the bond was not registered. OLDFIELD, J., in that case says expressly, and the other learned Judges seem to me to say by necessary implication, that the promise to pay and the hypothecation were distinct transactions.

In this state of the authorities, the question being one of very general importance, I think the matter should be referred to a Full Bench.

The question which I propose to refer is, whether the absence of registration is a bar to this suit.

FIELD, J.—I concur in making this reference to a Full Bench.

Baboo *Srinath Dass* and Baboo *Grija Sunker Mozumdar* for the appellant.

Baboo *Mohiny Mohun Roy* and Baboo *Makund Nath Roy* for the respondent.

The judgment of the Full Bench was as follows:—

The question we have to decide is, whether an unregistered bond, containing a personal undertaking to repay money borrowed and also a hypothecation of land above Rs. 100 in value as security, may be used in evidence to enforce the personal obligation.

The section on which the case turns is s. 49 of the Registration Act, III of 1877, which says: "No document required by s. 17 to be registered shall affect any immovable property comprised therein.....or be received as evidence of any transaction affecting such property....., unless it has been registered."

In the previous Registration Act, XX of 1866, the corresponding section was s. 49, which provided that: "No instrument required by s. 17 to be registered shall be received in evidence in any civil proceeding in any Court, or shall affect any property comprised therein," if unregistered.

Under that Act it was held by a Full Bench of this Court in *Lachmiput Singh Dugar* v. *Mirza Khairat Ali* (1), that a

(1) 4 B. L. R. (F. B.), 18.

bond, such as that in question, was admissible to prove the debt. And the same view was taken by the High Courts of Madras, Bombay and N. W. Provinces—*Vallaya Padyachy* v. *Moorthy Padyachy* (1); *Tukaram Vithoji* v. *Khandoji Malharji* (2); *Sangappa Bin Ningappa* v. *Basappa Bin Parappa* (3); *Seeta Kulwar* v. *Jugurnath Pershad* (4). Under the Act, therefore, it was settled law for the whole of India that an unregistered document like the present was effectual and might be used in evidence to charge the person, though not the land. On a matter of such general importance, we think we ought not to hold the law to be changed, unless we see very clearly that the Legislature intended to change it. But when the language of the two Acts is compared it is seen that the words of the later are not more stringent, but less stringent, than those of the earlier.

We think also that in dealing with one of several Acts forming a consecutive series relating to the same subject, like the Registration Acts, we ought, as far as possible, to apply to the sections of the later Act the same method of construction which has been applied to the corresponding sections of the earlier. In the Full Bench case already referred to, the words "shall be received in evidence or shall affect" land were held to mean "should be received in evidence as a document affecting" land. We are applying exactly the same method of interpretation in holding that the words "shall be received as evidence of any transaction affecting land," mean,—shall be received as evidence of any transaction so far as it affects land. And this we think is the true construction.

The view which we thus take of the section renders it unnecessary to consider the question discussed in some of the cases, and in the referring order, whether a document of this kind embodies only a single transaction or may properly be said to contain two.

We answer the question referred to us in the negative, and dismiss the apppeal with costs.

(1) 4 Mad. H. C., 174.
(2) 6 Bom H. C. O. C., 134.
(3) 7 Bom H C. A. C., 1.
(4) 4 Agra H. C., 170.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Pigot.

1882 *December* 18.

DASSORATHY HURI CHUNDER MAHAPATTRA (PLAINTIFF) *v.* RAMA KRISHNA JANA AND OTHERS (DEFENDANTS.)*

Landlord and Tenant—Cuttack—Surborakari tenures—Alienation without consent of landlord—Forfeiture—Alienation by one of several co-sharers—Changing case made in plaint—Second Appeal.

The alienation of a surborakari tenure in Cuttack, and *à fortiori* the alienation of any portion of such tenure, is invalid without the consent of the landlord.

Assuming that the sale of such a tenure would entitle the landlord to re-enter as upon a forfeiture, the sale of a portion thereof by one of several co-sharers would not work a forfeiture of the whole tenure.

A plaintiff was not allowed to alter his case in second appeal.

THIS was a suit for the recovery of possession of land. The plaintiff was the zemindar. The first seven defendants—called the Jana defendants—were holders under him of a surborakari tenure; the eighth defendant, Gopinath Misser, was the heir of a purchaser from some of the Jana defendants. The plaintiff stated that the Jana defendants had partitioned the surborakari tenure between them; that afterwards the owners of some of the several shares purported to sell them to the father of the eighth defendant; and he charged that by such partition and sale and by each of them, the defendants had in law lost all their rights and interests in the holding, and were liable to be ejected.

The Jana defendants, who severed in their defences, pleaded that they had a right to partition the lands between themselves as they thought fit, and to sell any of such portions when partitioned. They also pleaded limitation.

The Court of first instance gave the plaintiff a decree which was modified on appeal to the lower Appellate Court. The Judge said:

"Of late years, at least, the Courts of Orissa have always held the sur-

* Appeal from Appellate Decree Nos. 2025 and 2233 of 1881, against the decree of A. W. Cochran, Esq., Officiating Judge of Cuttack, dated the 5th September 1881, modifying the decree of W. Wright, Esq., Subordinate Judge of that district, dated the 31st December 1880.

borakari tenure to be indivisible and inalienable without the zemindar's consent. Respondent quoted two rulings quite in point—*Puddolochun Mundle* v. *Lukhun Burrooah*(1), and *Doorjodhun Doss* v. *Chooya Daye* (2). The ruling quoted on the other side—*Saddanundo Maiti* v. *Nowrattam Maiti* (3)—is not a weighty one. The question whether *surborakaris* were capable of being alienated or not was not raised in the lower Court in that case, and no evidence was given. A surborakari is not a mokuddami, and no one in Orissa confounds the two. Mr. Ricketts clearly distinguishes between the two. Merely because the allowance made to the surborakar is called malikhana, I cannot conclude that he is malik; the word malikhana has a secondary meaning much more often used than its primary one. It is very clear the plaintiff never sanctioned either the division or the alienation; had he done so, separately obtained receipts would have been forthcoming. I hold his suit is within time, even though I do not agree with the lower Court that the Janas should be ejected. He was not bound to recognize the division or the alienation in any way till his rights were affected. This suit has come out of the rent case of 1874.

"The order of the lower Court as to khas possession I cannot confirm. The Jana defendants may have acted vexatiously, but it has not been shown that they acted contrary to law, or did really anything more than persist in fighting the zemindar on the points at issue here now. They had perhaps some reason to think they could alienate. I certainly cannot say that they have plainly and certainly acted vexatiously. Appellant quoted *Kashenath Punee* v. *Lukhmonee Pershad* (4), and *Suddye Purira* v. *Boistub Purira* (5). Both are in point. I modify the lower Court's order, and, while allowing the Janas to remain in possession, set aside the alienation, and declare that the division of the tenure is not legal without the landlord's consent."

The plaintiff appealed to the High Court on the grounds that he was entitled, on the facts found by the District Judge, to a decree for possession; that on the question of forfeiture, the Judge had mistaken the nature of a surborakari tenure; and that had he taken a correct view of the nature of the tenure he would have held that the defendants had forfeited their rights therein.

Gopinath Misser also appealed against that portion of the decree setting aside the sale to his father.

Baboo *Nil Madhub Sen* for the appellant.

(1) 2 S. D. A., 1860, p. 109.
(2) 1 W. R., 322.
(3) 8 B. L. R., 280.
(4) 19 W. R., 99.
(5) 12 B. L. R., 84: 15 W. R., 261.

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DASSORATHY HURI CHUNDER MAHAPATRA v. RAMA KRISHNA JANA.

Mr. *Twidale* and Baboo *Obhoy Churn Bose* for the respondents.

The judgment of the Court (PRINSEP and PIGOT, JJ.) was delivered by

PRINSEP, J.—We think that the conclusion arrived at by the lower Appellate Court is correct.

Any acts of one or more of several joint tenants which possibly might operate as a forfeiture of tenancy, would not entitle the landlord to exact that penalty as against all the tenants; moreover the plaintiff zemindar's case has throughout been that the tenure cannot be split up by any arrangement among the tenants as between themselves, and that he is not bound to, and will not acknowledge the validity of, any such arrangement by which separate specific rights are created.

We cannot now allow him in second appeal to alter his case and to claim a forfeiture on any specific shares of the joint tenancy so as to entitle him to recover khas possession of those shares. The landlord's appeal must therefore be dismissed.

The appeal of the assignee of the rights of some of the sharers must also be dismissed, as it has been found on the authority of reported cases that the alienation of a tenure of this description (a *surborakari* tenure) in Cuttack, and *à fortiori* any portion of it, is invalid without the consent of the landlord.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Mitter

1883 *February* 27.

HEM CHUNDER SOOR (PLAINTIFF) *v* KALLY CHURN DAS (DEFENDANT)*

Evidence Act, (I of 1872), s 92—Mortgage—Sale—Conduct of Parties —Oral Evidence when admissible to prove that an apparent sale is a mortgage—Admissibility of Parol Evidence to vary a written Contract.

The defendant, in answer to a suit by the plaintiff for possession of certain land alleged that the kobala, which purported to be an out-and-out sale in favor of the plaintiff, and on which the plaintiff based his title to the property, was intended by the parties to operate only as a mortgage; and to prove such allegations tendered evidence of the circumstances under

*Appeal under s 15 of the Letters Patent against the decree of Mr Justice Field, dated the 21st July 1882, in appeal from Appellate Decree No. 1953 of 1881.

which the kobala was executed, and of the conduct of the parties to show that the document had all along been treated as a mortgage and intended to operate as such

Held, that such evidence was admissible.

Held also that s. 92 of the Indian Evidence Act made no alteration in the law as laid down in *Kashi Nath Chatterjee* v *Chandi Charan Banerjee* (1), but is in accordance with what was decided in that case. *Baksu Lakshman* v. *Govinda Kanji* (2), followed; *Ram Doyal Bajpie* v. *Hera Lal Paray* (3); and *Daimoddee Paik* v. *Kaim Turidar* (4), dissented from.

THIS was an appeal under the provisions of s. 15 of the Letters Patent against the decree of Mr. Justice Field.

The plaintiff sued to recover possession of 2¼ bighas of land under a kobala dated the 18th Aughran 1285, (3rd December 1878) executed in his favor by the defendant. The defendant, while admitting the execution of the kobala, pleaded that it was only a mortgage transaction, and that the mortgage debt had been paid. The only question for trial was whether the transaction was an out-and-out sale, or only a mortgage.

The document on the face of it purported to be an out-and-out sale, but at the hearing of the case before the Court of first instance the defendant offered to adduce evidence to prove that there was a contemporaneous verbal agreement that the property would be reconveyed on repayment of the consideration money. This was objected to under s. 92 of the Evidence Act.

The Munsiff held that, though evidence was not admissible to vary the terms of the kobala, still it was open to the plaintiff to show by the surrounding circumstances that the transaction, though called an absolute sale, had all along been treated by the parties as a conditional one; and he held that this view was supported by the Full Bench decision in *Kashi Nath Chatterjee* v. *Chandi Charan Banerjee* (1), and that the law had not been altered by s. 92 of the Evidence Act: *Ram Doyal Sen* v. *Radha*

(1) B L. R. Sup. Vol, 383: S. C. 5 W. R, 62.
(2) I L R, 4 Bom, 594.
(3) 3 C. L. R., 386.
(4) I. L R., 5 Calc., 300: S. C., 4 C L. R, 419.

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Nath Sen (1). He therefore allowed the defendant to adduce evidence with regard to such circumstances, and found as a fact that the defendant had all along remained in possession of the land; that the value of the land was far in excess of the sum mentioned in the kobala which was only Rs. 15; that that amount had been tendered by the defendant to the plaintiff but had been refused, and that the defendant had accordingly deposited it in the Judge's Court within a few months of the date of the transaction; that the defendant's homestead lands were comprised in the kobala, and that there was no provision in the deed for his remaining in possession, and that shortly after the date of the transaction the defendant had erected a house, value Rs. 25, on the land. He further found that the custom of executing a kobala for a conditional sale was still in existence in the district. On these grounds he decided the issue in favor of the defendant, and dismissed the suit with costs.

The plaintiff then appealed against the decree on the ground that the Court below had erred in admitting the evidence objected to, and on appeal relied on the cases of *Ram Doyal Bajpie* v. *Hera Lal Paray* (2) and *Daimoddee Paik* v. *Kaim Taridar* (3) as showing that the Court below had erred in admitting the evidence alluded to. The Subordinate Judge, however, considered that s. 92 of the Evidence Act had made no difference in the law, and following the decision in *Baksu Lakshman* v. *Govinda Kanji* (4) held that the decision of the lower Court was correct, and accordingly dismissed the appeal with costs. The plaintiff then specially appealed to the High Court, and the appeal was heard by Mr. Justice Field who delivered the following judgment:—

The only ground of appeal urged in this case is that the Courts below have erred in law in admitting evidence of a contemporaneous oral agreement varying the terms of the kobala. I think it quite clear that the Courts below did not admit evidence of a contemporaneous oral agreement varying the terms of the kobala.

(1) 25 W. R., 167.
(2) 3 C. L. R., 386.
(3) I. L. R., 5, Calc., 300: S. C., 4 C. L. R., 419.
(4) I. L. R., 4 Bom., 594.

What they did admit was evidence of conduct subsequent to the kobala, showing that the parties had waived the arrangement incorporated in the kobala, and had, by mutual agreement evidenced by conduct, treated the transaction as a mortgage. The very fact that the plaintiff did not get possession upon the execution of the kobala was pregnant evidence to show that the parties never treated the transaction as an out-and-out sale. The Munsiff says in his judgment: "Though evidence was not receivable to vary the terms of the kobala, I was of opinion that it was open to the defendant to show by surrounding circumstances that the transaction, though called an absolute sale, had all along been treated as a conditional one only." The Subordinate Judge, though not using equally precise language, has confirmed this judgment of the Munsiff. I see no reason to interfere, and I dismiss the appeal with costs.

The plaintiff then preferred this appeal under s. 15 of the Letters Patent.

Baboo *Saroda Churn Mitter* appeared on behalf of the appellant.

Baboo *Troilukhyo Nath Mitter* for the respondent.

The judgment of the Court (GARTH, C.J., and MITTER, J.) was as follows:—

GARTH, C.J.—In this case the plaintiff (appellant) sued for possession of 2¼ beegahs of land, which he claimed to have purchased absolutely from the respondent under a kobala, dated the 18th Aughran 1285 (3rd December 1878).

The respondent admitted the kobala, but contended that the transaction between the plaintiff and himself was a mortgage only.

In support of this view, the defendant relied partly upon oral evidence of the transaction, and partly upon the conduct of the parties, more especially the fact that the plaintiff had never taken possession, although the kobala was dated the 3rd December 1878, and this suit was not brought until the year 1880.

He also relied upon the further fact, that the sum of Rs. 18,

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which was admitted to be the consideration for the kobala, was scarcely one-fourth the value of the property.

The plaintiff all along objected to the reception of these facts in evidence upon the ground that the defendant was precluded by s. 92 of the Evidence Act from bringing forward any evidence to vary or contradict the terms of the kobala.

The lower Courts, however, have admitted the evidence, and have gone into all the circumstances of the case; both holding that, although parol evidence as a rule is not admissible to contradict or vary the terms of a written agreement, yet that, in a case of this kind, the Court is bound to look to the surrounding circumstances, and to the acts and conduct of the parties, for the purpose of ascertaining whether that which appears upon the face of the deed to be an absolute sale, had been treated by the parties and intended by them as a conditional sale only. In support of this position, both Courts relied upon the Full Bench case of *Kashi-Nath Chatterjee* v. *Chandi Charan Banerjee* (1).

The learned Judge in this Court, although putting the case upon a somewhat different ground, has confirmed the judgment of the lower Courts.

It has now been argued before us that, although the Full Bench case above referred to established the law in the year 1866, s. 92 of the Evidence Act, which was passed in 1872, must be considered as having overruled the Full Bench decision; and that the cases of *Ram Doyal Bajpie* v. *Hera Lal Paray* (2), and *Daimoddee Park* v. *Kaim Taridar* (3), have decided that s. 92 of the Evidence Act has so altered the law.

If I could see any ground for supposing, that the Full Bench case is not law at the present day, or that s. 92 of the Evidence Act either made, or intended to make, any alteration in the rule of evidence which prevailed here before the Act was passed, and which was recognized as law in the Full Bench case, I should consider that our proper course was to refer the question to another Full Bench; but when I look to the language used by Sir Barnes

(1) B. L. R., Sup. Vol., 383; S. C., 5 W. R., 68.

(2) 3 C. L. R., 386.

(3) I. L. R., 5 Calc., 300; S. C. 4 C. L. R., 419.

Peacock in that case, it seems to me that s. 92 of the Evidence Act lays down in terms the same rule as Sir Barnes Peacock then stated to be the law.

And the principle upon which the judgment in the Full Bench case proceeded is one which, in my opinion, is perfectly consistent with that rule.

It is a principle which has constantly been acted upon by Courts of Equity in England, as well as by the Courts of this country; and notably by the Bombay High Court in the cases of *Hasha Khand* v. *Jesha Premaji* (unreported), and of *Baksu Lakshman* v. *Govinda Kanji* (1).

In the latter case there will be found an excellent judgment of Mr. Justice Melvill, in which he very clearly explains this principle of equity, and the mode and the circumstances under which it may be applied.

I quite agree with that learned Judge, that the true ground upon which the equitable jurisdiction of the Court proceeds generally in cases of this kind, is that of fraud, and this (as Mr. Justice Melvill observes) is very clearly stated by L. J. Turner in *Lincoln* v. *Wright* (2).

That was a case in its circumstances very similar to the present. Wright had brought an action of ejectment against Lincoln to recover certain land, which the latter had conveyed to him by a deed, which appeared on the face of it to be an absolute conveyance. Lincoln then brought a suit in equity to restrain the ejectment, on the ground that the transaction was in reality a mortgage; and he relied, in support of that contention, partly upon a parol agreement, and partly upon the acts and conduct of the parties. L. J. Turner says: "The principle of the Court is, that the Statute of Frauds was not made to cover fraud. If the real agreement in this case was that, as between the plaintiff and Wright, the transaction should be a mortgage transaction, it is in the eyes of this Court a fraud to insist on the conveyance as being absolute; and parol evidence must be admissible to prove the fraud."

The main difference between that case and the present is, that there the question arose upon a bill filed in equity to restrain the

(1) I. L. R., 4 Bom., 594. (2) 4 De G. and Jones, 16.

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ejectment, whereas here it arises in the form of an equitable defence to the ejectment suit.

Another very ordinary form in which the same principle is recognized and acted upon, is in suits to alter or reform deeds of conveyance, upon the ground that they were not drawn up in accordance with the true intention of the parties. Suppose, for example, that the present defendant on hearing that the plaintiff was about to treat the kabala as an absolute sale, had brought a suit to have the deed reformed in accordance with what he contends to have been the true arrangement between the parties, the only way in which he could establish his claim in such a suit would be by showing what the real transaction was, and how the circumstances of the case and the conduct of the parties were in accordance with his view of the matter. The ground of such a suit would be fraud or mistake; and that fraud or mistake might be set up as well by way of defence to a suit like the present, as in a substantive suit to alter or reform the conveyance.

It is remarkable, that in the Full Bench case of *Kashi Nath Chatterjee* v. *Chandi Charan Banerjee* (1), already referred to, the two facts which were mainly relied upon as showing that the transaction was a mortgage instead of a sale, are the same which are relied upon in this case, namely: (1st) that possession was not given to the purchaser at the time of sale, and that he never sought to obtain possession until long afterwards; and (2nd) that the consideration mentioned in the deed was a very small sum, as compared with the selling value of the property.

I think, therefore, that we are bound by the authority of the Full Bench case to confirm the judgment of the Court below; and it seems to me that we are not constrained, by any of the authorities to which our attention has been called, to refer the question to a Full Bench.

As my learned brother agrees with me in this view, the appeal will be dismissed with costs.

Appeal dismissed.

(1) B. L. R. Sup. Vol. 383: S. C. 5 W. R., 68.

Before Mr. Justice McDonell and Mr. Justice Tottenham.

BEER CHUNDER MANIKKYA AND OTHERS (DEFENDANTS) *v.* RAJ COOMAR, NOBODEEP CHUNDER DEB BURMONO. (PLAINTIFF).*

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Jurisdiction—Rajah of Tipperah—Sovereign Prince—Suit against Sovereign Prince with respect to land owned by him, and situate in British India—Maintenance—Charge on immovable property—Benefits to arise out of land—General Clauses Consolidation Act (I of 1868), s. 2, cl 5—Civil Procedure Code (Act X of 1877), Chap. XXVIII, s. 433.

The Rajah of Hill Tipperah is a Sovereign Prince within the meaning of Chapter XXVIII of Act X of 1877, and cannot be sued personally in the Courts of British India except under the conditions specified in s 433 of that Act.

The fact of a defendant not subject to the jurisdiction of a Court having waived his privilege in previous suits brought against him does not give the Court jurisdiction to entertain a suit against him in which he pleads that he is not subject to such jurisdiction.

A suit for maintenance which seeks to have the maintenance made a charge on immovable property is not a suit for immovable property within the meaning of clause c, s. 433, Act X of 1877, nor is it a suit for "benefits to arise out of land" within the meaning of the definition of the words "immovable property" contained in Act I of 1868, s. 2, cl. 5

A claim for maintenance is not a charge upon immovable property.

A member of the royal family of Hill Tipperah brought a suit against the Rajah to have it declared that with respect to certain land situate within British India, and forming portion of the possessions of the Rajah, he was entitled to the post of juboraj, and to succeed to such land on the death of the Rajah, and also claimed maintenance, and sought to have it declared that such maintenance should be a charge on the revenues of the land situate in British India.†

Held, that the British Courts had no jurisdiction to entertain the suit, it not being one for immovable property.

BY a *kulachar* or family custom prevalent in Independent or Hill Tipperah the reigning Rajah for the time being provides for the succession to the throne after his death by nominating a *juboraj* (or young rajah), and a barra thakoor. According to such custom, on the death of the Rajah the juboraj succeeds as

* Appeals from Original Decrees Nos. 104 and 137 of 1881 against the decree of R. Towers, Esq., Judge of Tipperah, dated the 24th January 1881.

† Leave had been obtained to bring the suit.

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of right to the throne, and the barra thakoor becomes juboraj. In default of such appointment the next heir of the deceased Rajah succeeds.

On the 1st August 1862 Ishan Chunder Manikkya Bahadoor, the then reigning Rajah of Tipperah, died leaving three sons, Brojendro Chunder, Nobodeep Chunder (the plaintiff in the present suit) and Rohini Chunder. The throne was then taken possession of by the defendant Beer Chunder Manikkya, one of the defendants, a brother of Ishan Chunder Manikkya who alleged that by a roobokari, dated the 31st of July 1862, the late Rajah had appointed him juboraj, and had also appointed Brojendro Chunder barra thakoor, and the plaintiff kurta. In September 1862 the British Government recognised Beer Chunder as the *de facto* Rajah of Tipperah. In 1863 Brojendro Chunder died. In 1869, after the final decision of a suit with reference to the succession to the guddee, Beer Chunder was recognised by the British Government as the *de jure* Rajah, and was formally installed as Rajah in the spring of 1870. In 1870 Beer Chunder appointed his son Radha Kishore to the office of juboraj, and in 1878 he also appointed Samerendra Chunder to the office of barra thakoor. In 1874 the plaintiff came of age, and brought a suit against Beer Chunder in the district Court of British Tipperah, alleging that the above roobokari was a forgery, claiming possession of a zemindari named Chuckla Rowshanabad in British territory, and to set aside the appointment of Radha Kishore as juboraj. This zemindari had for many years been owned by the reigning Rajah of Tipperah, and the question of the succession to the Raj had been frequently considered, and decided, in suits brought in British Courts with reference to this zemindari.

Claims for maintenance from the proceeds of his zemindari had also been made by members of the royal family of Tipperah and, as a matter of fact, the maintenance of the members of the royal family was usually, if not invariably, provided for from the revenues of this zemindari. This suit was ultimately dismissed on appeal by the High Court (1), that Court deciding that Beer

(1) 25 W. R., 404.

Chunder had been validly appointed juboraj. The plaintiff having applied for permission under s. 433 of the Civil Procedure Code to sue the Maharajah in the Civil Court of Tipperah for maintenance, and for a declaration of his right to the possession, on the death of the Maharajah, of his zemindaries situate in British India, obtained the sanction of the Lieutenant-Governor of Bengal by a Resolution, dated the 25th February 1878, to institute a suit for that purpose, so far as related to those zemindaries. He accordingly instituted the present suit to obtain a declaration that he was entitled to take possession of the zemindari on the death of Beer Chunder, and to have his maintenance fixed at Rs. 5,000 a month, and declared a charge on the zemindari, as well as to obtain arrears of maintenance. Subsequently to the institution of the suit, the Secretary to the Bengal Government. in reply to questions put by the District Judge of Tipperah on the 28th December 1878, wrote that for the portion of his estates which lies within British territory the Maharajah holds the position of a zemindar; that the succession to Hill Tipperah followed the succession to the zemindari; that the Maharajah was not an independent ruling chief within the meaning of s. 433, and that no leave was necessary for suits to be brought against him in the Civil Courts of Tipperah with respect to property held by him in British India.

The suit was in the first instance brought against Beer Chunder alone, but subsequently Radha Kishore and Samerendra Chunder were added as defendants.

The defendants pleaded, amongst other things, that inasmuch as the Rajah of Tipperah was an independent Sovereign Prince the British Courts had no jurisdiction; that the claim was barred by limitation; that the matter was *res judicata;* that the appointment of the plaintiff as kurta did not give him any right to succeed to the other posts; and that the maintenance of the plaintiff was not a charge upon the zemindari Chuckla Rowshanabad.

The lower Court gave a decree in favor of the plaintiff for the sum of Rs. 13,360, as arrears of maintenance from the 1st May 1878, at the rate of Rs. 600 a month, up to the date of the institution of the suit; and held that he was entitled to maintenance at the same rate for the future, and that it should be a

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charge on the zemindari Chuckla Rowshanabad, but dismissed the remaining portion of the plaintiff's claim.

From this decision both parties appealed, and at the hearing of the appeal it was arranged that the question of jurisdiction should be first argued and decided.

The *Advocate-General* (The Hon. *G. C. Paul*), Mr. *Branson*, Mr. *Pugh*, Mr. *Evans*, Mr. *Bell*, Baboos *Kally Mohun Dass*, *Doorga Mohun Dass*, *Bhoobun Mohun Dass*, *Kuloda Kunker Roy*, *Bussunt Coomar Bose*, *Sree Nath Banerjee*, *Jogesh Chunder Roy*, *Amar Nath Bose*, *Sita Nath Roy*, and Moonsheo *Serajul Islam* appeared for the appellants.

The *Standing Counsel* (Mr. *Phillips*) Mr. *Trevelyan*, Baboos *Mohiny Mohun Roy*, *Grija Sunker Mojoomdar*, *Grish Chunder Chowdhry* and *Horendro Nath Mookerje* for the respondent.

The Advocate General.—Feudatories are as independent as Sovereign Princes (Act X of 1877, s. 433). This is not a suit for land, and whether maintenance be a charge on the land or not it cannot be enforced in British India. The case is the same as if the Rajah had contracted to give maintenance and been sued for breach of such contract. In the suit brought by Neelkisto against Beer Chunder for possession of the zemindari the then Advocate-General contended that the Tipperah royal family was joint, and that the oldest male member was manager; but it was held that the Raj descended entire to one member of the family, and in that suit the decision of the High Court was affirmed on appeal by the Privy Council:—*Neelkisto Deb Burmono* v. *Beer Chunder Thakoor* (1). Their Lordships in that decision say (p. 534) that the suit was brought to recover "a very valuable zemindari, being that part of the royal possession of the Rajah of Tipperah which lies within the jurisdiction of the British Crown. The Rajah of Tipperah, though in respect of these lands subject to the laws and Courts of British India, is, in fact, an independent prince with a considerable territory known as the Tipperah Hills, and as the title to the zemindari and to the Raj is the same, the dispute respecting the former involves a question of the right of the succession to the *musnad* or throne of the independent principality." Beer Chunder could

(1) 12 Moore's I. A., 523. S. C., 3., B. L. R. P. C, 13.

not have raised the question of jurisdiction in that suit, as that would have been a breach of faith. Independent Tipperah had recognized the paramount power of the Nawab of Moorshedabad and afterwards of the British Empire. In litigation from the year 1809 the British Government had refused to recognize any one as Rajah until the title was tried in British India, and consequently the Rajah was obliged to sue or to be sued in order to establish his title. He could not therefore plead he was a sovereign, because the Government would not recognize him, and the suit was for possession of British land; but he could have pleaded he was a Rajah, and that he could not be sued and he took that objection, but Macpherson and Morris, JJ., held in *Raj Kumar Nobodeep Chunder Deb Burmono* v. *Rajah Beer Chunder Manikkya Bahadoor* (1) that the title to the throne followed the zemindari, and consequently that the Rajah would cease to be such by their decision against him as to the zemindari. But there was another decision to the contrary in the case of *Maharajah Beer Chunder Manikkya Bahadoor* v. *Ishan Chunder Thakoor* (2).

The Hutwa case, *Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee* (3) is in point.

In this case the zemindari is part of the royal possessions of the Rajah of Tipperah and follows the Raj. The Privy Council seem to think that being *de facto* Rajah is enough—*Neelkisto Deb Burmono* v. *Beer Chunder Thakoor* (1). If the King of France were to hold lands in England the Courts there could not try his right to be King of France—*Lachmi Narain* v. *Rajah Partap Sing* (4)—(see Mr. Evans' argument at p. 4).

First, then, Beer Chunder could take objections to jurisdiction, for he is an independent sovereign, and this suit does not concern land (Vattell's Law of Nations, edn. 1797, Bk. I, ch. 1; Wheaton's International Law, pp. 58 and 69). Moreover, the Government has deputed a Political Agent to Tipperah, a course which shews that the Rajah is independent, and that he is so is also admitted by the plaintiff by the mere fact that he has applied to the Government for leave to institute this suit. The Court

(1) 25 W. R., 404. (2) 3 C. L. R., 417.
(3) 12 Moore's I. A., 1. (4) I. L. R., 2 All., 1.

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cannot decide as to who is entitled to the Raj after a Rajah's death, and if it had jurisdiction it should not make such a declaration.

The case of *Urjun Manick Thakoor* v. *Ramgunga Deo* (1) shews that the barra thakoor is not entitled to be juboraj. The appointment of juboraj is a sovereign act. If Chuckla Rowshanabad was sold for arrears of Government revenue the purchaser could not appoint a juboraj. The subject-matter of a suit is that which you seek to recover. Here it is not land, but (1) a declaration, and (2) maintenance, and that does not make the suit one for immovable property and does not bring it within the provisions of s. 433 of Act X of 1877 which section does not comprise interests in immovable property. By International Law if a king sues he subjects himself to a cross suit. Clause 3 of s. 433 applies to cases when the proceeding is *in rem* where it would be immaterial whether the real owner was a party or not as in an ejectment suit in England. Where the property itself is proceeded against the dignity of the Rajah is not affected, as a suit for land could always be brought against an agent.

With respect to the claim for maintenance it is said to be a charge, but it is no more a charge than debts or the expenses of investing a boy with the Brahminical thread are. He must establish his right before he can get a charge—*Tareeny Churn Bonnerjee* v. *Maitland* (2). Debts are a first charge on an inheritance—*Greender Chunder Ghosh* v. *Mackintosh* (3). It makes no difference to a charge for debts whether the debtor is dead or alive. A Hindu widow cannot claim a charge for maintenance against her brother-in-law—*Massammut Bheeloo* v. *Phool Chund* (4); *Lakshman Ram Chandra* v. *Sarasvatibai* (5); *Bhyrub Chundra Ghosh* v. *Nubo Chunder Guho* (6). The decision of White and Morris, JJ., in *Beer Chunder Mankkiya* v. *Chandressur Mohadebya* (judgment delivered 9th July 1879) does not touch the question. The Courts here are Courts of limited jurisdiction. In the Hutwa case—*Beer Pertab Sahee* v. *Moharajah Rajendra Persad Sahee* (7) the property was joint. In *Ramgunga*

(1) 2 Sel Rep. (n. ed.) 177.
(2) 11 Moore's I. A., 317.
(3) I. L. R., 4 Calc., 897.
(4) 3 Sel. Rep. (n. ed.) 298.
(5) 12 Bom. H. C., 69.
(6) 5 W. R., 111.
(7) 12 Moore's I. A., 1.

Deo v. *Doorgamonee Juboraj* (1) nothing was said as to a charge. See also *Neelkisto Deb Burmono* v. *Beer Chunder Thakoor* (2).

As to the position of Tipperah, see Aitchison's Treaties, Vol. I, Ed. 1876). Aitchison uses "appointed" in the sense of "recognized." See also Hunter, pp. 469 and 515.

A Political Agent is appointed only for Independent States. Rowshanabad was part of the royal possession of Tipperah. A portion of the old Raj was lost to the Rajahs of Tipperah, and when it came under the British Government and the settlement of the zemindari was effected with the Rajah or the land became subject to the Courts of this country, but it cannot be separated from the Raj. The only title decided by the Civil Courts is that of Rajah. The zemindari is part of the Raj, although the Rajah cannot exercise civil jurisdiction over it. The Rajah is not concerned to dispute the existence of a paramount power which has the right to decide questions of disputed succession. When the title is once confirmed no further decision can be given as to the title. The Governor-General in Council would not be bound to follow the decision of the Courts—*Duke of Brunswick* v. *The King of Hanover* (3); Westlake's International Law, pp. 56, 62, 67, 69, 78 and 119: the Succession Regulation of 1800.

How is the defendant subject to the jurisdiction of this Court as to his being declared juboraj? If he was a resident within the jurisdiction he could not on that ground be sued as to the appointment of juboraj—*The East India Company* v. *Syed Ally* (4). The plaintiff cannot get relief because he must first get the appointment of juboraj set aside, which appointment was a sovereign act. The fact that there is land in the jurisdiction makes no difference—*The Charkieh* (5); *The Parlement Belge* (6); *Smith* v. *Weguelin* (7). If the land is public land of the estate you cannot reach it at all—*Doss* v. *Secretary of State for India in Council* (8); *The City of Berne* v. *Bank of England* (9); *Lachmi*

(1) 1 Sel Rep. (n ed.) 361.

(2) 12 Moore's I. A, 523. S. C. 3, B L. R P. C 13.

(3) 6 Beav 1. S. C. 2, H. L C. 1. (4) 7 Moore's I J A, 555.

(5) L R, 4 Ad. & E, 59 cf. p. 97 S. C 42, L. J. P. & M. 17.

(6) L. R 5 P. D., 197. (7) L. R 8 Eq. 198 cf., p. 206.

(8) L. R, 19 Eq., 509. (9) 9 Ves., 347.

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Narain v. *Rajah Partap Sing* (1); *Ladkuvarbai* v. *Ghoelshri Sarsangji Pratabsangi* (2).

As to maintenance any declaration in *Ramgunga Deo* v. *Doorgamonee Juboraj* (3), as to the rights of the other members of the family would be an *obiter dictum*, for the first Court had ordered that the property should be divided amongst the heirs. We do not deny that the Rajah in possession is liable to maintain the other members of the family, but the amount of maintenance is a matter entirely within his discretion. Regulation X of 1800 has nothing to do with the zemindari, and Regulation XI of 1793 does not apply—*Gunesh Dutt Sing* v. *Moharajah Moheshur Sing* (4); *Beer Pertab Sahee* v. *Maharajah Rajendra Pertab Sahee* (5). The Raj comes to the sole heir, so the plaintiff cannot have a charge on the property not having any interest in it. There is no case to shew that maintenance is a charge (Cf. Mayne's Hindu Law, ss. 374 and 388), and if it were a charge it would bind everybody. A widow's maintenance is not a charge—*Srimati Bhagubati Dassi* v. *Kanai Lal Mittra* (6); *Lukshman Ramchandra* v. *Sarasvatibai* (7); *Adhirainee Narain Coomary* v. *Shona Malee Pat Mahadai* (8); *Bhyrub Chunder Ghose* v. *Nubo Chunder Guho* (9); Mayne's Hindu Law, ss. 384 and 386; Strange's Hindu Law, Vol. I, p. 166. As to the definition of the word "charge" see *Tareeny Churn Bonnerjee* v. *Maitland* (10). The *Advocate-General* during the course of his argument cited the case of *Lakshman Ramchandra Joshi* v *Satya Bhamabai* (11) with reference to the question of maintenance, and also referred to Seton On Decrees, pp. 642, 825 and 1128; *Greender Chunder Ghose* v. *Mackintosh* (12); *The Secretary of State* v. *Kamachee Boye Sahaba* (13).

Mr. *Branson* on the same side.—In no case before Macpherson J.'s decision in *Raj Coomar Nobodeep Chunder Deb Burmono* v. *Rajah*

(1) I. L. R., 2 All., 1.
(2) 7. Bom. H. C. O. C. 150.
(3) 1 Sel. Rep. (n ed) 361.
(4) 6 Moore's I. A. 164.
(5) 12 Moore's I. A., 1.
(6) 8 B. L R., 225.
(7) 12 Bom. H C, 69.
(8) I. L. R 1 Calc., 365.
(9) 5 W. R., 111.
(10) 11 Moore's I. A., 317.
(11) I. L R., 2 Bom., 494.
(12) I. L. R 4 Calc., 897.
(13) 7 Moore's I. A, 476.

Beer Chunder Manikkya Bahadoor (1) had the Rajah been recognized before suit. The Privy Council not only abstained from saying that they had jurisdiction, but expressly stated that they treated the case as one between subject and subject. Macpherson, J., says that there has been a submission to the jurisdiction, and that the decision of the Courts carried with it the succession to the Raj, but in all the instances given the Rajah had not been recognised as *de jure* Rajah, and that decision established the fact that the zemindari belonged to the Rajah of Tipperah.

The plaintiff himself admits that the Rajah is a foreign prince, by the fact that he has applied for permission to sue under s. 433. As to maintenance see *Khettramoni Dasi* v. *Kashinath Das* (2). A widow has a right to have her maintenance ascertained, but it cannot be charged until it has been so ascertained, and then it is only chargeable, in case there is danger to the plaintiff of losing the maintenance by the alienation of the property—*Bhagabati Dasi* v. *Kanailal Mittra* (3). Can this Court ascertain maintenance paid to the other members of the royal family? Before any decree can be made and the amount fixed, an account must be taken of the property of the Rajah, and this Court cannot call on a foreign prince to submit to an account.

Mr. *Pugh* for Radha Kishore was proceeding to address the Court, when objection was taken that only two counsel could be heard for the appellants. The Court held that two counsel were entitled to be heard on behalf of each appellant.

Mr. *Pugh*.—A suit to declare a trust upon land is not a suit for land—*Bagram* v. *Moses* (4); *Kellie* v. *Fraser* (5); *Delhi and London Bank* v. *Wordie* (6).

Debts are not a charge on the property, but they are prior to maintenance.

Mr. *Phillips* (for the respondent.)—The Courts of a country have jurisdiction in respect of all the territory of the country to whomsoever it may belong by private title, or in other words, the private right cannot oust the jurisdiction of the Court. The

(1) 25 W. R., 404.
(2) 2 B. L. R., A. C. 15, see. p. 43.
(3) 8 B. L. R., 225.
(4) 1 Hyde, 284.
(5) I. L. R., 2 Calc., 445.
(6) I. L. R., 1 Calc., 249.

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zemindari, Chuckla Rowshanabad, is in British Tipperah, and within the jurisdiction of the Court of that district, and it cannot be withdrawn from that jurisdiction, on the ground that it belongs to a foreign sovereign. No part of British territory can be the public property of a foreign sovereign, and exempt from British laws. To hold otherwise would be to hold that there may be portions of the territory in which the laws of the country, to which it belongs, do not prevail, and that there might be an *imperium in imperio*—Wheaton, Int. Law, p. 160, ch. II, paras. 1, 2, 3, (164), s. 4; Westlake, Int. Law, pp. 56, 62, 67 to 69, 78; Woolsey, Int. Law, p. 119. We do not dispute that the title to the zemindari goes with the Raj. It is said that the Hutwa case—*Beer Pertap Sahee* v. *Maharajah Rajendra Pertab Sahee* (1) is analogous to this case, and that it was held there that the property be restored as belonging to the Raj.

That is true as to the course of succession, but the question there was, whether there had been a confiscation, and, if so, on what terms the property had been re-granted (see pp. 24, 33 and 35 of the report in Moore). The immunity of sovereigns to suits does not extend to immovable property—*The Gharkieh* (2); and a foreign sovereign cannot withdraw immovable property from the jurisdiction of the Court, because no process need issue against the sovereign; and a sovereign acquiring lands acquires no immunity with regard to such lands. In that case it was held that the Khedive was not an independent power, and the Maharajah is certainly not inferior to the Khedive. The case is important as shewing that with regard to immovable property there never was any question as to jurisdiction. The case of the *Parlement Belge* (3) lays down no rule as to immovable property; it only refers to movable property. [*The Advocate General.*—Is it contended that if a sovereign held land he could be sued and called upon to answer interrogatories?] We contend that he could be sued in the same way as any private person; the cases quoted only refer to movable property. In Wheaton, Int. Law, p. 160, the general principle is laid down that the State is supreme over all and within

(1) 12 Moore's I. A., 1.

(2) L. R. 4 Ad. & E., 59. S. C. 42, L. J. P. & M. 17.

(3) L. R. 5 P. D. 197.

its jurisdiction. The question here is whether the Rajah is not obliged to maintain the members of his family out of his revenues, and this must be decided according to the laws of British India. [McDONELL, J.—If the suit is one for immovable property it can be reached under s. 433.] That is so. In the case of the *Duke of Brunswick* v. *The King of Hanover* (1) it was held by Lord Brougham that if the foreign sovereign entered into a contract with respect to land, specific performance might be enforced by the Court, and that would be a personal suit against the sovereign. Here the process could be served on the agent in possession of the zemindari, so the personal dignity of the Rajah would not be affected. In that case also the instrument upon which the suit was brought was an instrument executed by virtue of a sovereign power.

In *Taylor* v. *Best* (2) it is laid down that jurisdiction may be founded on the sovereign submitting himself to the jurisdiction, and Jervis, J., says that where the Civil Law prevails land may be made the foundation of jurisdiction, so may goods unconnected with the office. In the *Magdalena Steam Navigation Co.* v. *Martin* (3) there was no jurisdiction, as the defendant had no real property in England. If he had had real property, the Court seems to imply that he could have been sued. In *Lachmi Narain* v. *Rajah Partap Singh* (4) the land was outside British India, and the question was whether the land was within the jurisdiction, not whether the Nawab of Rampur was subject to the jurisdiction. It is assumed that if the land were within British India, a suit would lie, and so that case is in our favor. In *Ladkuvarbai* v. *Ghoel Shri Sarsangji Pratabsangji* (5), the British Government exercised no controlling or paramount power. They merely stopped execution of the decree, but they did not set it aside. In *Smith* v. *Weguelin* (6), there was no question of sovereign right; the Court merely decided that it had no jurisdiction. All the cases are in my favor to this extent that land within the jurisdiction gives jurisdiction.

The present case is governed by Act X of 1877, ss. 431, 432, 433.

(1) 2 H. L. C., 1 Cf., p 24-26.
(2) 14 C. B, 521; Cf. p. 522.
(3) 2 E & E., 94.
(4) I. L R., 2 All., 1
(5) 7 Bom. H. C. O. C., 150.
(6) L. R. 8 Eq., 198.

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The Executive Government have to determine who are sovereign princes, and Government have declared that this prince is not a sovereign prince. The consent of Government has been signified to this suit being brought by the letter from the Secretary to the Bengal Government, and under Act X of 1877, s. 2, the word Government includes a local Government. The High Court cannot recognize a sovereign prince until he has been recognised by the Government.

The Rajahs of Tipperah have repeatedly sued and been sued in the British Courts, and with respect to the matters of the Raj itself. They have executed bonds and been sued upon contracts. They have had pecuniary transactions with British subjects by holding themselves out as subject to British Courts, and they have also been sued upon contracts for maintenance, and so with regard to a Rajah who uses the Courts as a subject, it was only natural that the Government should refuse him the immunities of a sovereign.

There have been suits from the year 1880 down to the present time for the Raj, and it is now too late to raise the question of jurisdiction. The Rajah has previous to this suit been sued for maintenance and no objection to jurisdiction was taken until in the suit before Macpherson, J.

In *Maharajah Beer Chunder Manikkya Bahadoor* v. *Ishan Chunder Thakoor* (1), the point of jurisdiction was not decided. The Court decided that the grant was invalid, as it was governed by the law of Tipperah, and, therefore, resumable. The grant was made out of the revenues of Tipperah, and the contract was made in Tipperah. The Court could have no jurisdiction unless part of the cause of action arose in British India. [McDONELL, J.—Mr. Cockerell's letter does not seem to have been accurately worded, as there is no dispute as to his being a sovereign chief of Hill Tipperah.] It isn't a case of independence; it is a question of immunity from suit. [*The Advocate General.*—The letter was written in the Judicial Department, and was clearly a judicial and not a political opinion.] It was a declaration of the Rajah's status, and shewed that he was not entitled to any immunities. He is spoken of as an absolute prince, and has power of life and

(1) 3 C. L. R., 417.

death, but that does not shew that he is entitled to immunities from suits. The fact of his being a Zemindar in British Territory and a subject, so far as the Zemindari goes, distinguishes the case from that of European princes.

The British Courts are the Courts of the paramount power, and there is no instance in which it has been held that a feudatory could not be sued in the Courts of the paramount power.

Supposing, however, the Rajah has immunity, the suit will lie because it is one for land, the subject-matter being to obtain a charge on the immovable property. It is only auxiliary to the claim for maintenance that a declaration as to the juborajship is asked for, the reason being that by his exclusion from that office the plaintiff is entitled to a greater amount of maintenance; but if the Court thinks it can't make such declaration, the decree can exclude it.

We contend that the custom of the family is that the Rajah shall maintain the family of the deceased Rajah from the income of the zemindari. Plaintiff seeks to charge the zemindari with maintenance, therefore it is a suit for immovable property. By s. 2, cl. 5, Act I of 1868, immovable property includes benefit to arise out of immovable property. We do not contend that the plaintiff has an actual charge, as it will be sufficient if he prays for a charge to be declared on the property, as the suit is then for a benefit to arise out of the property. We claim a charge and that gives jurisdiction to enquire. If there is no charge there is an end of the case. The other side relies on the case of the Hindu widow, but the Hindu widow is not in the same footing as the son, and even against the heir a widow's maintenance is a charge on the estate. Here there is a charge.

In *Ram Gunga Deo* v. *Doorgamoonee Juboraj* (1), maintenance was a charge on the assets. In *Bhyrob Chunder Ghose* v. *Nubo Chunder Guho* (2), all that is decided is that the right of maintenance can't be attached. Under certain circumstances the claim to maintenance might ripen into a charge.—*Nilkant Chatterjee* v. *Peari Mohun Dass* (3).

(1) 1 Sel. Rep. (N. Ed.) 270.
(2) 5 W. R. 111.
(3) 3 B. L. R., O. C., 7.

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A charge for maintenance until declared is only an equitable right and creates no interest in the land. In these Courts it is sufficient to have an equitable interest, although this would be of no avail against a *bonâ fide* purchaser—*Srimati Bhagabati Dasi* v. *Kanailal Mitter* (1); *Mangali Debi* v. *Dinonath Bose* (2). These cases shew that the widow has something more than an equitable interest. [McDONELL J.—Does not *Adhiranee Narain Coomary* v. *Shona Malee Pat Mahadai* (3), shew that the claim for maintenance is a liability and not a charge?] It would only be a liability, if it was not charged by the decree on the property; claims which have not ripened into charges cannot be binding on the property—*Lakheman Ram Chandra Joshi* v. *Satyabhamubai* (4), merely decides that a purchaser for payment of a debt has a superior title to the widows' claim for maintenance. A widow if entitled to no share is entitled to a charge on the property if the heirs neglect to pay her maintenance (Mayne, p. 386), *Mussumut Khukroo Misrain* v. *Jhoomuck Lall Dass* (5): and a charge for maintenance binds a person into whose hands the property comes—*Goluck Chunder Bose* v. *Ranee Ohilla Dayee* (6)

Mr. *Phillips* during the course of his argument also cited the following cases on the subject of maintenance: *Mussumut Gola Koonwar* v. *The Collector of Benares* (7); *Himmatsing Becharsing* v. *Ganpatsing* (8); *Chuoturya Run Murdun Syn* v. *Sahub Parhulad Syn* (9); *Muttasawmy Jagavera Yettappanaicker* v. *Vencataswara Yettaya* (10); *Rahi* v. *Govind Valad Teja* (11); *Viramuthi Udayan* v. *Singaravelu* (12); *Anund Lal Sing Deo* v. *Maharajah Dheraj Gurrood Narain Deo* (13); *Nilmony Singh Deo* v. *Hingoo Lall Singh Deo* (14); *Beer Pertab Sahee* v. *Maharajah Rajendra Pertab Sahee* (15); and concluded by laying down his propositions as follows:—

(1). According to International Law inmovable property

(1) 8 B. L. R., 225.
(2) 4 B. L. R. O. C., 72.
(3) I. L. R. 1 Calc., 365.
(4) I. L. R., 2 Bom., 494.
(5) 15 W. R., 263.
(6) 25 W. R., 100.
(7) 4 Moore's., I A., 246.
(8) 12 Bom. H. C. 94.
(9) 9 Moore's I. A 82.
(10) 12 Moore's. I. A. 203.
(11) I. L. R., 1 Bom 97.
(12) I. L. R., 1 Mad. 306.
(13) 5 Moore' I. A 82.
(14) I. L. R., 5 Calc. 256.
(15) 12 Moore's. I. A., pp. 18, 40.

draws with it no immunity from jurisdiction, but founds a jurisdiction against a sovereign prince.

(2). Under certain circumstances movable property similarly founds jurisdiction.

(3). According to principles of International Law, the Rajah of Tipperah can be in no better position than the Khedive, and cannot be exempt from suits in the Courts of the paramount power.

(4). That it is unnecessary to refer to International Law, as the subject has been dealt with by the Legislature, and the defendant must prove he is a sovereign prince within the meaning of s. 433, Civil Procedure Code, and that the immunity from jurisdiction has been expressly or impliedly conceded to him by the Government. That Mr. Cockerell's letter precludes discussion on that point, but that if the question is still open for discussion the treatment of the defendant by Government, in insisting upon his trying his title to the Raj in British Courts, clearly shews that there was no intention on the part of the Government to grant him any immunity or treat him differently from an ordinary zemindar within British territory.

(5). That the conduct of the Rajah in suing and allowing himself to be sued in British Courts and never objecting, till 1878, to the jurisdiction, and in holding himself out as being subject to the jurisdiction, renders it improbable that Government would grant him any immunity.

(6). That the present suit is a suit for immovable property within the meaning of s. 433 of the Code, and cl. 5, s. 2, of Act I of 1868, the object of the suit being to secure the maintenance as a charge on the zemindary.

(7). The plaintiff is entitled to maintenance, as he is excluded from inheritance for State convenience, and there can be no reason why he should be excluded from maintenance.

(8). There is evidence to show that the maintenance has always been paid out of the estate situated in British India, and we claim only as a member of the family of the late zemindar of Rowshanabad.

The Advocate General, in reply, cited the case of *Elphin-*

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stone v. *Bedree Chund* (1); and was dealing with Mr. Phillips' arguments when he was stopped by the Court.

The judgment of the Court (McDONELL and TOTTENHAM, JJ.) was delivered by

McDONELL, J.—This is an appeal from a decree of the District Judge of Tipperah, by which the plaintiff, respondent, was declared to be entitled to maintenance from the Maharajah of Hill Tipperah at the rate of Rs. 600 per mensem, and to arrears of the same from the 1st of May 1878 to the date of institution of the suit; and the decree further provided that the amount should be realized from the defendant's zemindari in British Tipperah.

The plaintiff, respondent, is Raj Coomar Nobodeep Chunder, a son of the late Maharajah of Hill Tipperah, and appointed by him to the office of kurta in the year 1862. Upon the death of this Maharajah, Ishan Chunder, he was succeeded by the present Maharajah Beer Chunder, who had been duly appointed "juboraj" by his predecessor and elder brother. In July 1874, the plaintiff made an attempt to oust him altogether. He brought a suit to recover possession of various properties held by the Maharajah in British India, upon the ground that he was the rightful heir to his father's rank and estates, and that the appointment of Beer Chunder as juboraj had been accomplished by fraud and collusion. His suit was dismissed both in the District Court and in this Court on appeal, upon the finding that Beer Chunder had been duly appointed to be juboraj, and as such had lawfully succeeded to the zemindari in British India as well as to the throne of Hill Tipperah.

Having been thus defeated in this Court on the 14th of August 1876, the plaintiff instituted this suit in March 1880. His prayer was twofold: (1), that the Court would, determining his rank, declare him entitled to take possession of the zemindari of Rowshanabad and other properties upon the death of the present Maharajah; and (2), that his maintenance be fixed at Rs. 5,000 per mensem, and be created a charge upon the said zemindari, arrears at that rate with interest being awarded to him from Assar 1278 to Maugh 1286 B. S. (June 1871 to January 1880.)

(1) 1 Knapp., 329, see note.

The rank claimed by him is specified in para. 4 of the plaint. It is that of juboraj, to which he claims to have ascended from the office of kurta through the succession of Beer Chunder to the throne, and by the death of his own brother Brojendro Chunder, who, having been appointed barra thakoor by his father, became, the plaintiff alleges, juboraj upon the elevation of Beer Chunder; plaintiff claims thus to have become from kurta, barra thakoor and from barra thakoor, juboraj. And in para. 7 of the plaint it is alleged that the claim of the members of the Rajah's family to maintenance is a charge upon the zemindari of Chuckla Rowshanabad and others.

With reference to the plaintiff's first prayer, to be declared juboraj, it should be mentioned that the defendant, Maharajah Beer Chunder, after being in the latter part of 1276 (1869) formally recognized and installed by the British Government, appointed in 1277, (August 1870), two of his sons to be juboraj and barra thakoor respectively, these appointments being, as he contended, vacant by the recent death of Brojendro Chunder.

The first prayer, therefore, of the present plaint practically asks to avoid the appointment of the present Maharajah's son as juboraj.

The suit was instituted only against the Maharajah, but by direction of the Court his two sons, whom he had appointed juboraj and barra thakoor, were added as defendants, and they join in this appeal.

The lower Court dismissed the first portion of the claim on the ground that it was barred by ss. 13 and 43 of the Code of Civil Procedure, and it found that the plaintiff's position as kurta gave him no right of succession to the higher positions of barra thakoor and juboraj. It, however, gave plaintiff the decree for maintenance against which, as we have above stated, the present appeal is directed.

In making this decree the Court overruled an objection taken from the first that the suit cannot be tried at all in the Courts of British India, and this question of jurisdiction is the main one with which we have to deal in this appeal.

This aspect of the case has been at great length and most completely put before us by the learned Counsel on either side, to

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whom the Court owes acknowledgments for the able manner in which they have assisted it in arriving at a conclusion. That conclusion is that our Courts have no jurisdiction to deal with either branch of the suit, and that consequently the lower Court ought to have dismissed it altogether.

It is hardly necessary to determine, for it does not seem to be questioned in this suit, that Hill Tipperah is a Sovereign State, in that it governs itself without dependence on any foreign power. It makes and administers its own laws, and the Maharajah admittedly exercises the power of life and death within his own territory.

Vide Vattell's Law of Nations, Book I, Chapter I.

Aitchison, in his collection of Treaties, Vol. I, p. 78, says: Independent Tipperah is not held by gift from the British Government or its predecessors, or under any title derived from it or them, never having been subjected by the Mogul.

Its acknowledgment of the British Government as the paramount power, and the nuzzar paid on the recognition by that Government of succeeding Maharajahs do not take from it the status which by the law of Nations it is entitled to hold—See Wheaton's International Law, pp. 58 and 69.

It is not contended by Mr. Phillips for the plaintiff, respondent, that our Courts would have any jurisdiction in a suit affecting the Raj itself, or the Maharajah in his character as such. He contends that because the zemindari Rowshanabad is within British Tipperah, and because the plaint is so framed as to rest upon this zemindari, the Court has jurisdiction over the subject-matter of the suit, and over the Maharajah, defendant, in his character as zemindar.

The Advocate-General, on the other hand, has contended that the Maharajah being a Sovereign Prince is not personally subject to the jurisdiction of our Courts in any suit whatever.

We are of opinion that whatever may be the merits of this contention, it is certain that the suit now before us is not one of which our Courts can take cognizance.

As regards the first portion of the prayer of the suit, *viz*, that the Court, determining the plaintiff's rank, declare him entitled to take possession of the zemindari on the death of the present Maharajah, we observe that this asks the Court to pronounce the plaintiff to be juboraj or heir apparent to the Raj: for it is only

as such that he could be entitled to succeed to the zemindari, and that is the rank which he specifically claims in the plaint. It is clear, however, that our Courts have no jurisdiction to decide who is juboraj of the foreign State of Hill Tipperah. It has been sometimes said that the title to the Raj follows the title to the zemindari or *vice versâ*; but this we consider is a mistake, for there are not two titles to the two estates, but the title to both is one and the same. The origin of the mistake is probably this, that the British Government has, in cases of disputed succession, abstained from recognising a new Maharajah, until the Courts have determined who is entitled to the zemindari. But it is equally the fact that the Courts have determined the right to the zemindari by ascertaining who was really the juboraj or heir to the Raj.

We further observe that for our Courts to entertain the plaintiff's suit and declare him juboraj would, if operative at all, have the effect of annulling the Maharajah's appointment of his own son as juboraj; but this appointment was an act of sovereignty performed by the Maharajah in his own territory, and as such it clearly cannot be questioned or set aside by the Courts of British India. Under the circumstances do we think that this claim could be entertained by our Courts.

The lower Court has dismissed this part of the claim on other grounds, as assuming that it had jurisdiction to entertain it. The plaintiff has also appealed against the decree in this respect, but our conclusion that there is no jurisdiction at all makes it unnecessary to consider the plaintiff's appeal.

Next, as regards the claim for maintenance, we might perhaps dispose of that too by holding that the grant of maintenance or the withholding of it is an act of sovereignty exercised by the Maharajah with which our Courts have nothing to do; but Mr. Phillips for the plaintiff, respondent, while contending that he is entitled to maintenance both against the defendant as Maharajah, and as against him as zemindar of Rowshanabad, admits that we have jurisdiction only in respect of his claim as a son of the late zemindar of Rowshanabad. We have therefore to consider whether we have even so much jurisdiction.

The learned Advocate-General's proposition is that, the defendant Maharajah being a foreign Sovereign Prince recognised by

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the Government of British India, he cannot be sued personally in our Courts, except under the provisions of Chap. XXVIII of the Code of Civil Procedure. He cited numerous authorities to shew that the principles of International Law protected sovereigns recognised by any State from the jurisdiction of the Courts of such State. We understood Mr. Phillips to contend on the contrary that such immunity does not attach to a Sovereign Prince unless it be expressly conferred upon him.

In the present case, however, we think that we need not look further than to the Code of Civil Procedure. Sections 431, 432, 433 contain the provisions enacted in regard to suits by or against foreign princes. If the Maharajah defendant is such a prince or Chief as to come within the purview of these sections, then a suit can be entertained against him in our Courts only on the conditions contained in s. 433. Mr. Phillips contended that the onus lay upon the Maharajah of proving that he is such a prince as is contemplated by s. 433, and he submitted that any such claim had been expressly negatived by the Government in the letter of the Secretary to the Government of Bengal, dated 25th December 1878, and printed at page 18 of the paper book. In this letter it is stated that the Maharajah is not an independent ruling chief within the meaning of s. 433 of the Civil Procedure Code.

It seems to us, however, that it is for the Courts, and not for the Government, to say whether or not any particular chief or prince comes within the purview of that section. We look upon this passage as nothing more than an expression of opinion conveyed to the Judge of Tipperah, and we must add that we think it the expression of an erroneous opinion. For it has been shewn to us that Hill Tipperah is a Sovereign State, and that the Maharajah, defendant, has been formally recognised by the British Government in India. We are, therefore, bound to hold that he is a ruling chief, and that he cannot be tried in the Courts of British India, excepting under the conditions specified in s. 433.

We may add that the same opinion was judicially expressed by a Division Bench of this Court (Mitter and Maclean, JJ.) on

the 19th of June 1878, or six months before the date of the letter in question in Regular Appeal No. 22 of 1877 (1).

The plaintiff himself recognized this status of the defendant, for he applied for, and obtained permission from, the Government of Bengal to bring this suit—See copy of Resolution printed at p. 17 of the paper book.

Plaintiff must then shew that his suit falls within one of the clauses *a*, *b*, *c*, of the section. It is admitted that clauses *a* and *b* are not applicable to this case. Unless therefore clause *c* applies, that is, unless the subject-matter of the suit is immovable property, the suit cannot be maintained at all. At first sight we should certainly not be inclined to say that a suit for a declaration of the plaintiff's status and for maintenance had for its subject-matter "immovable property," and this would be another reason for rejecting the first portion of the suit.

As regards maintenance, however, Mr. Phillips referred us to the definition given of "immovable" property in the General Clauses Act (I of 1868) which includes "benefits to arise out of land," and he ingeniously suggested that the maintenance claimed by plaintiff since he asks that it be made a charge upon the zemindari, is, in fact, immovable property.

But we think it is impossible to contend that the plaintiff's claim to maintenance, assuming it to be a valid one, constitutes of itself a charge upon any particular property of the Maharajah. It is not pretended that were the zemindari of Rowshanabad to be sold for arrears of revenue the plaintiff would have a lien upon it, as against the purchaser, for the maintenance which he considers that he has a right to claim from the Maharajah. Of course, if the Court could give him a decree, it might order the amount decreed to be a specific charge upon the zemindari, and thus the claim might be said to be one which might ripen into a charge. But in the abstract a claim for maintenance is no more a charge on property than the expenses of marriage, or other religious ceremonies. Debts due by a deceased person stand higher than other claims upon his estate, and yet debts are no charge upon specific property unless expressly made so by bond or by a decree.

(1) *Maharajah Beer Chunder Manickya Bahadoor* v. *Ishan Chunder Thakoor*, 3 C. L. R., 417.

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It is not necessary to refer particularly to the long list of cases and authorities cited with reference to this part of the case. Mr. Mayne gives the effect of them in his chapter on maintenance. The result of the whole is that we are satisfied that the present suit cannot be said to be one for immovable property, and that consequently there is nothing in s. 433 which gives us jurisdiction to entertain it.

Before concluding, we should perhaps notice an argument that it is too late for the Maharajah to contend against the jurisdiction of our Courts, inasmuch as he has frequently sued and been sued in them attorning to their jurisdiction. One case is relied upon by the plaintiff in which a Division Bench of this Court (White and Morris, JJ.) refused to allow the Maharajah to take the plea of no jurisdiction. But this was because he had not taken it in the lower Court, and only for that reason; and some of the suits in which he attorned were brought before the Maharajah had been recognized *de jure* by our Government, and when therefore no such plea on his part could have been entertained in regard to claims in British Tipperah.

Further, it is a mistake to suppose that because the Maharajah chooses to waive his privilege in one suit he is thereby precluded from pleading it in any other. We hold, therefore, that the argument based upon previous conduct has no weight in respect of the question raised in this suit.

This being so, we must decree this appeal, and reverse the decree of the lower Court, so far as it is adverse to the defendant.

The suit is, therefore, dismissed with costs of both Courts. The defendants Nos. 1 and 2 are strictly entitled to separate costs, but under the circumstances we give but one set of costs.

This decision renders it necessary that the plaintiff's appeal No. 137 be dismissed with costs.

Appeal No. 104 *allowed, and Appeal No.* 137 *dismissed.*

Before Mr. Justice Wilson and Mr. Justice Macpherson.

ICHAMOYEE CHOWDHRANEE AND OTHERS (DEFENDANTS) *v.* PROSUNNO NATH CHOWDHRI AND OTHERS (PLAINTIFFS.)*

1883 *July 31st.*

Arbitration—Award—Application to have an award filed in Court—Private arbitration—Civil Procedure Code (Act X of 1877), ss 525, 526.

Where an application is made under s. 525 of the Code of Civil Procedure to have an award filed in Court, and it appears to the Court, on cause shown why the award should not be filed, that there is a reasonable dispute between the parties on any of the grounds mentioned in ss. 520 or 521, the application should be dismissed.

Under s. 525 of the Code of Civil Procedure, sufficient cause may be shown by affidavit or verified petition.

Sree Ram Chowdhry v. *Denobundhoo Chowdhry* (1), and *Sashti Charan Chatterjee* v. *Tarak Chandra Chatterjee* (2) referred to.

THIS was a rule to show cause why a decision of the Subordinate Judge of Pubna, in the matter of the filing of a private award under s. 525 of the Code of Civil Procedure, and dated the 30th of January 1882, should not be set aside by the High Court. The material portions of the Subordinate Judge's judgment are as follows :—

This is a suit or application under s. 525 of Act X of 1877 brought by the plaintiffs to enforce a private award made by the arbitrators Probat Chundra Sen and others, appointed under an agreement dated 25th September 1877, said to have been entered into between Ananda Nath Chowdhoree, the husband of the plaintiff No. 1 and the father of the plaintiff No. 2, and Sham Soonder Chowdhoree, the husband of the defendant Ichamoyee Chowdhranee. It was alleged that after the death of the said Sham Soonder Chowdhoree the present defendant gave her consent to the arbitration proceedings, and after the award was made by the arbitrators she acted upon it by receiving money due to her under the terms of the said award. Hence this suit. The written statement of the defendant is to the effect—(1), that the present suit is barred by limitation, inasmuch as the legal representatives of the deceased Ananda Nath Chowdhoree have not been joined as plaintiffs within the specified time; (2), that the present suit cannot proceed on an award stamped insufficiently; (3),

* Rule No. 463 of 1882 against the order of Baboo Jeebun Kristo Chatterjee, Subordinate Judge of Pubna and Bogra, dated the 30th January 1882.

(1) I. L. R., 7 Calc., 490.

(2) 8 B. L. R., 315.

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that the ekrar deed executed by Sham Soonder Chowdhoree is not binding upon his heirs, and also that the arbitrators had no authority to proceed upon the said ekrar after the death of Sham Soonder Chowdhoree; (4), that Ichamoyee Chowdhranee did not give her consent to the arbitration, and she had no power under the will of her husband to do so, and if she has given any consent that consent is not legally admissible in evidence; (5), that the award in question cannot be filed inasmuch as it had been made a long time after the ekrar deed, which does not mention any specified time; (6), that deceased Ananda Nath Chowdhoree acted in contravention of the ekrar deed before the arbitration began, therefore the award cannot be enforced against the defendant; (7), that the private award cannot be filed in this Court under the following grounds: [These grounds were twelve in number, and were to the effect that the arbitrators had partitioned lands which they ought not to have partitioned, and had not partitioned lands which they ought to have partitioned; that they had not carried out the provisions of the agreement in some respects, and had exceeded their powers in others; that they had examined witnesses in the absence of the defendant without giving notice; that they had been partial to the plaintiff and had given a decision against the weight of the evidence taken before them; and that the conduct of the other party in the arbitration had been fraudulent.] The Subordinate Judge then went on to say:—

The points to be determined in this case are: (1st), whether the plaintiffs are entitled to bring this suit without joining all the persons named in the will and without coming in as executor or executrix; (2nd), whether the present suit is barred by the provisions of s. 366 of Act X of 1877; (3rd), whether the ekrar deed executed by the deceased Sham Soonder will be binding against his heirs; 4th, whether the private award was made according to the provisions of s 520 and 521 and in equity, if so are the plaintiffs entitled to file it in the Court? [The Subordinate Judge then discussed the evidence and came to a finding on all the issues in favour of the plaintiff.] He then went on to say:—

Under these circumstances I come to the clear conclusion that the award in question is valid in law as well as in equity, and it was acted upon by receiving the property mentioned in it by both the parties, and it can be filed in the Court of Justice.

Mr. *Evans*, Baboo *Mohini Mohun Roy* and Baboo *Issen Chunder Chuckerbutty* for the petitioners.

Mr. *Bell* and Baboo *Grija Sunker Mozoomdar* opposed the application.

The following judgments were delivered by the Court (WILSON and MACPHERSON, JJ.)

WILSON, J.—This was a rule granted under s. 622 of the Procedure Code, to shew cause why an order of the Subordinate Judge of Pubna, directing an award to be filed, should not be set aside. The rule was granted upon two grounds, the first and most important of which is, in my opinion, sufficient to dispose of the case, *viz.*, "that considering the cause shown against the award the order ought not to have been made."

The question turns upon the construction of ss. 525 and 526 of the Procedure Code. Section 525 says: "When any matter has been referred to arbitration without the intervention of a Court of Justice, and an award has been made thereon, any person interested in the award may apply to the Court of the lowest grade having jurisdiction over the matter to which the award relates, that the award be filed in Court. The application shall be in writing and shall be numbered and registered as a suit between the applicant as plaintiff and the other parties as defendants. The Court shall direct notice to be given to the parties to the arbitration, other than the applicant, requiring them to shew cause within a time specified, why the award should not be filed."

Section 529 says: "If no ground, such as is mentioned or referred to in s. 520 or 521, be shewn against the award, the Court shall order it to be filed, and such award shall then take effect as an award made under the provisions of this chapter."

In the present case differences having arisen between two brothers Ananda Nath Chowdhoree and Sham Soonder Chowdhree, they entered into an agreement of reference by which they submitted thirteen specified matters to arbitration. This was on the 25th September 1877.

On the 3rd of October 1878, Sham Soonder died, leaving the present applicant his widow and executrix, and five infant sons, and she obtained probate of the will.

After Sham Soonder's death the arbitrators proceeded with the reference; and on the 30th of May 1880 they made their award. Ananda Nath applied to the Subordinate Judge to file the award under s. 525 and then died. His widow, as next friend of his minor sons, and his major son were substituted for him in the proceedings.

The present applicant presented a written statement in which

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she contended that the award was bad on the ground that the agreement of submission did not bind the representatives of Sham Soonder; and also on grounds that, if true, showed that the award had left undecided certain of the matters referred, and had dealt with matters not referred, and was bad on the face of it, objections within the scope of s. 520. The Subordinate Judge overruled all the objections, and ordered the award to be filed. We have to say whether that order should be set aside or not.

If the words in s. 526, "no ground, such as is mentioned or referred to in s 520 or 521, be shewn against the award," mean, 'be established to the satisfaction of the Court,' then so far as such objections are concerned, we cannot say that the Subordinate Judge was wrong in filing the award; but I think the terms of the section are complied with, and grounds are shewn, when it is shewn by written statement or affidavit or other verified statement, that the award is impugned as invalid for any of the reasons contained in ss. 520 and 521, and that the Court is then bound to hold its hand, and leave the parties to their remedy by suit. This appears to me the more natural construction of the section, and it is certainly the one most in accordance with justice and convenience. I am not at all inclined to strain the language of the Statute when the effect would be to deprive the parties of their ordinary right to have their controversies (other than those which they have agreed to refer) tried by suit with a right of appeal, and compel them to submit to a summary decision without appeal.

This question has not, so far as I am aware, been actually decided; but it has on several occasions been considered by Division Benches of this Court, and the opinions expressed have been in accordance with the views I have expressed. In *Sashti Charan Chatterjee* v. *Tarak Chandra Chatterjee* (1), Norman, J., at page 324, Loch, J., at page. 328, and Paul, J., at page 332 clearly express this view. In the recent case of *Sree Ram Chowdhry* v. *Deno Bundhoo Chowdhry* (2), Pontifex, J., at p. 492, distinctly states the law in the same way.

(1) 8 B. L. R., 315.
(2) I. L. R., 7 Calc., 490.

It was pointed out in argument before us that this conclusion might introduce a different rule in the case of awards made wholly out of Court from that which must apply in the case of arbitration arising out of suits or in which the submission has been filed. It may be so; but the language used in dealing with the two cases is entirely different.

There is an additional objection to the present order, because the applicant, when before the Subordinate Judge, denied altogether that the submission was binding upon her, and s. 525 seems to me to have no application to a case in which the submission or its binding effect is in dispute.

The order of the Subordinate Judge will therefore be set aside.

MACPHERSON, J.—I concur in holding that the order of the Subordinate Judge should be set aside. One of the material contentions before the Subordinate Judge was that the award was not binding on Ichamoyee, the applicant before us, as she was no party to the agreement of submission to arbitration executed by her husband as one of the contracting parties, and there was nothing in the agreement to bind his representatives. Further, it was contended that she had never given any such consent to the arbitration, which commenced after her husband's death, as to make the award binding on her. The Subordinate Judge, after taking evidence, held that she had consented, and that the award was binding on her, and then after disposing of many other objections to the proceedings of the arbitrators he passed an order that the award should be filed under the provisions of s. 526. The agreement related to many matters which were to be the subject of arbitration, and included the taking of accounts and determination thereon whether any balance remained due from one party to the other. Though the agreement was executed nearly a year prior to the death of her husband, no action appears to have been taken by the arbitrators till about nine months after his death. Whether there were or were not sufficient grounds to justify the Subordinate Judge in holding that the agreement was binding on her by consent or otherwise, is a matter which we need not consider, as I think he had no power to determine the question, and in doing so exceeded the jurisdiction which he could exercise under

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ss. 525 and 526. The power of a Court acting under these sections seems to be very limited.

They neither contemplate nor authorize a decision on disputed matters outside the award itself and the action of the arbitration as bearing on it. The construction put by this Court on the corresponding section of Act VIII of 1859, was in effect that if the Court decided disputed questions bearing on the authority of arbitrators to make an award, the decision was one from which an appeal would lie. In other words, the Court had decided a question which it was not intended it should decide finally. Act X of 1877 took away the right of appeal, and s. 526 indicated more clearly than the corresponding section of Act VIII of 1859, the grounds which might possibly be the subject of inquiry, and narrowed rather than extended the power of the Court. On this ground I would set aside the order of the Subordinate Judge. I also concur in holding that when a Court, in dealing with an application under s. 525, finds there is a *bonâ fide* and a reasonable dispute on any of the grounds mentioned in ss. 520, 521, it ought to hold its hand, and would be justified by the words of the section in doing so; but I hesitate to say that when such grounds of objections are set forth in a verified petition or affidavit, the Court is to make no inquiry, or that if it does decide on evidence that no grounds exist, the decision is one with which we could interfere under s. 622.

Order set aside.

FULL BENCH REFERENCE.

Before Sir Richard Garth, Knight, Chief Justice, Mr. Justice Mitter, Mr. Justice McDonell, Mr. Justice Prinsep and Mr. Justice Wilson.

DIGUMBER ROY CHOWDHRY AND OTHERS (DEFENDANTS) *v.* MOTI LAL BUNDOPADHYA (PLAINTIFF) *

1883 *February* 28.

Hindu Law—Inheritance—Bengal School of Hindu Law—Sapinda—Brother's daughter's son.

According to the Bengal School of Hindu law a brother's daughter's son is a *sapinda*, and is, therefore, a preferable heir to the great-great-great-grandfather's great-great-great-grandson.

THIS case was referred to a Full Bench by Mr. Justice McDonell and Mr. Justice Field, two of the Judges of the Court, on the 7th June 1882, with the following opinion :—

FIELD, J.—The question raised in this appeal is whether a brother's daughter's son is a preferable heir to the great-great-great-grandfather's great-great-great-grandson. That the brother's daughter's son is an heir depends upon the principle which was laid down and defined in the Full Bench case of *Guru Gobind Shaha Mandal* v. *Anund Lal Ghose Mazumdar* (1). In that particular case it was the father's brother's daughter's son who was declared an heir, but the principle is the same in the case of a brother's daughter's son. That case merely decided that such a son is an heir. It left undetermined the further question—what precise position is such an heir to occupy in the category of heirs. In the judgment of Mr. Justice Dwarka Nath Mitter at pages 45 and 46, this question was expressly stated to be left undetermined. On the present occasion it becomes necessary to decide this question. The doctrine of spiritual welfare must, as the law is now settled, determine the order in which any person entitled to succeed is to rank in the category of heirs. Now, in the present case referring to the genealogical tree to be found at page 10 of the paper-book,

* Full Bench Reference made by Mr. Justice McDonell and Mr. Justice Field, dated the 7th June 1882, in Appeal from Appellate Decree, No 2445 of 1880.

(1) 5 B L. R., 15 . S. C., 13 W. R., F. B , 49.

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Byddo Nath is the late owner. The plaintiff Moti Lal Banerjee offers a *pinda* or undivided oblation to Anund Chunder, Ram Sunker and Basdeb Roy. The deceased Byddo Nath participates in two of these *pindas*, that is, those offered to Ram Sunker and Basdeb. The defendants offer *pindas* to three persons, Ram Prosad (or Ram Cumar), Ram Sunker and Nund Kishore. They offer a *lepa* or divided offering to Bissessur Roy, Ram Bullubh Roy and Ram Bullubh Roy's father. The deceased Byddo Nath participates in two *lepas*, *viz.*, those offered to Ram Bullubh Roy and Ram Bullubh Roy's father. The question then is reduced to this: "Is the efficacy of two *pindas* offered by a cognate superior to that of two *lepas* offered by an agnate"? It appears to us that this question ought to be answered in the affirmative; and in support of this view we may refer to paragraphs 425, 426 and 432 of Mr. Mayne's work on Hindu Law. In the last paragraph Mr. Mayne says: "The result of these rules in Bengal is, that not only do all the *bandhus* come in before any of the *sakulyas* or *samanodakas*, but that the *bandhus themselves* are sifted in and out among the agnates, heirs in the female line frequently taking before very near *sapindas* in the direct male line, on the principle of superior religious efficacy. In fact, if the test of religious efficacy is once admitted, no other arrangement would be logically possible." To the same purport are para. 5, s. 1, chap. XI of the Dyabhaga; and the passages to be found at pages 763, 771, 772 and 880 of the Principles of the Hindu Law of Inheritance by Baboo Raj Cumar Sarvadhicari, and at page 276 of the second edition of Baboo Shyama Churn Sircar's work on Hindu law. We think that these passages establish, *first*, that the plaintiff in this case is a *sapinda* of the deceased Byddo Nath; and, *secondly*, that no *sapinda*, even a *sapinda* whose *sapindaship* depends upon cognate relationship, is an inferior heir to any *sakulya*. We do not overlook the fact that a *pinda* offered by a cognate is of secondary importance as compared with a *pinda* offered by an agnate; but we think it clear that a *pinda* offered by a cognate is of superior efficacy to any *lepa* or divided offering by an agnate. The case of *Kashee Mohun Roy* v. *Raj Gobind*

Chuckerbutty (1) is opposed to the view which we take. In that case the plaintiff Raj Gobind Chuckerbutty offered one *pinda* or undivided offering in which the deceased Bharut participated, *viz.*, that which was offered to the common ancestor Ram Sunker. The defendant Kripa Nath Bagchi offered one *lepa* or divided offering to the same Ram Sunker Bagchi. In that case, therefore, the question really was whether a *pinda* offered by a cognate was of superior efficacy to a *lepa* or divided offering offered by an agnate. That case differs from the present case merely in this, that in the case which we have to decide the parties stand in different degrees of propinquity; and the number both of divided and undivided offerings is double. The decision in the case of *Kashee Mohun Roy* v. *Raj Gobind Chuckerbutty* (1) was not based altogether upon the principle of spiritual efficacy; and it would no doubt be possible to draw a distinction between that case and the present case on the ground that in that case the relationship of the contending parties to the deceased was different from the similar relationship of the parties in the present case; and that, therefore, much of the reasoning upon which the decision in that case was based would not be applicable to the case which we have to decide. We think, however, that the true test is that of spiritual efficacy; and, tried by this test, the cases are exactly analogous. As the question is one of some doubt and is of considerable importance to the Hindu community, we think that it will be better to refer it to a Full Bench. We therefore refer the following question to a Full Bench: "Is a cognate *sapinda* a preferable heir to an agnate *sakulya*?"

Baboo *Rash Behary Ghose*, Baboo *Golap Chunder Sircar*, Baboo *Hem Chunder Banerjee*, Baboo *Bipro Dass Mookerjee* and Baboo *Umakali Mookerjee*, for the appellants.

When the appellants' case was opened, Mr. Justice Mitter said: "Is not the question settled by Dayabhaga, XI, 6, 20?"

Baboo *Rash Behary Ghose*—See Sarvadhicari's Principles of Inheritance, p. 857—The spiritual benefit conferred by the plaintiff is of superior efficacy—Dayabhaga, XI, 1, 4; XI, 2, 27.

(1) 24 W. R., 229.

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Baboo *Golap Chand Sircar* on the same side :—Dayabhaga, XI, 6, 20, does not include a brother's daughter's son, for he does not offer three oblations in which the deceased participates, Dayatattwa, XI, 78; Dayabhaga, XI, 6, 9. Fifth in descent being excluded, the brother's daughter's son is excluded. Srikrishna's Dayakrana Sangraha has not been followed—*Gobind Proshad Talookdar* v. *Mohesh Chunder Surma Ghuttuck* (1). See also Dayabhaga, XI, 230; XI, 6, 29, 33.

Baboo *Guru Dass Banerji* and Baboo *Saroda Prosunno Roy* for the respondent.

The judgment of the Full Bench was delivered by

MITTER, J.—We are of opinion that according to the Hindu law current in the Lower Provinces of Bengal a brother's daughter's son is a preferable heir to the great-great-great-grandfather's great-great-great-grandson.

In the Full Bench decision in *Guru Gobind Shaha Mandal* v. *Anund Lal Ghose Mazumdar* (2) Mr. Justice Dwarkanath Mitter was of opinion that a cognate of this description is a *sapinda*, as defined in the Dayabhaga. A brother's daughter's son offers two *pinds* or undivided oblations to the father and the grandfather of the deceased in which he participates. Whereas the great-great-great-grandfather's great-great-great-grandson is not connected with the deceased through the medium of undivided oblations. He is a *sakulya* or an agnate, connected with the deceased through the medium of divided oblations. Therefore, the competition in this case is between a cognate who is a *sapinda* and an agnate who is a *sakulya*. According to the Dayabhaga, it does not admit of any doubt, that a *sapinda*, though a cognate, is a preferable heir to a *sakulya* agnate. The following passages of the Dayabhaga are clear upon this point :—

"The order of succession then must be understood in this manner : On failure of the father's daughter's son or other person who is a giver of three oblations (presented to the father, &c.), which the deceased shares or which he was bound to offer,

(1) 15 B. L. R, 35 : S. C., 23 W. R., 117.
(2) 5 B. L. R., 15 : S. C, 13 W. R, F. B, 49.

the succession devolves in the next place on the maternal uncle and others, (namely, his son and grandson)"—Chap. XV, s. 6, para. 20.

But on failure of kin in this degree, the distant kinsman (*sakulya*) is successor. For Manu says : "Then, on failure of such kindred the distant kinsman shall be the heir, or the spiritual preceptor or the pupil." The distant kinsman (*sakulya*) is one who shares a divided oblation (s. I, § 37) as the grandson's grandson or other descendant within three degrees reckoned from him, or as the offspring of the grandfather's grandfather or other remote ancestor," paragraph 21.

But it has been contended that the question referred to the Full Bench in the case cited above being whether a father's brother's daughter's son is entitled to be recognized as an heir according to the Hindu law current in the Bengal School, it is binding upon us upon that question only ; that we are not concluded by the grounds upon which it was based ; and that we are competent to reconsider them. But this contention is not sound. The Full Bench decided that a father's brother's daughter's son is an heir *because he is a sapinda.* If we are to follow this decision, we must hold that a father's brother's daughter's son or any other cognate conferring similar spiritual benefits upon the deceased is a *sapinda.* It is to be further borne in mind that the heritable rights of such cognates either must be based upon their *sapinda* relationship, or they would not be in the line of heirs at all.

"If the right of the father's son, and of the maternal uncle and the rest," says the author of the Dayabhaga in para. 28, s. 6, Chapt. XI, "be not considered as intended by the text, 'To three must libations of water be made, &c.,' *they would have no right of succession* since they have not a place among distant kinsmen and others whose order of succession is specified."

Therefore unless we decline to follow the Full Bench decision in *Guru Gobind Shaha Mandal* v. *Anund Lal Ghose Mazumdar* (1), we must hold that a brother's daughter's son is a *sapinda,* and therefore a preferable heir to the great-great-great-grandfather's great-great-great-grandson.

(1) 5 B. L R, 15 : S. C., 13 W. R., F. B, 19.

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The learned Judges who have referred this question to a Full Bench are also of this opinion. The reference was made in consequence of a contrary ruling in *Kashee Mohun Roy* v. *Raj Gobind Chuckerbutty* (1). It appears to us that in that case the learned Judges held that a *sakulya* relative was a preferable heir to a cognate *sapinda*. That decision is therefore clearly opposed to the rule of law laid down by the author of the Dayabhaga in the passages cited above.

The result is that this appeal fails. It is accordingly dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Cunningham and Mr. Justice Maclean.

1883 *January* 24.

MOHUN CHUNDER KURMOKAR AND ANOTHER (DECREE-HOLDERS) *v.* MOHESH CHUNDER KURMOKAR AND OTHERS (JUDGMENT-DEBTORS).*

Limitation—Act XV of 1877, *Sch. II, Art.* 179.—*Execution of Decree—Partition—Joint Decree—Decree for Partition.*

A consent decree for partition made between three parties contained a provision that if the plaintiffs should not have the property partitioned within two months from the date thereof, any one of the other parties to the suit might obtain partition by executing the decree. One of the parties sued out execution and obtained partition and possession of his own share. More than three years after the date of the decree, but less than three years from the date of the application just mentioned, another of the parties applied for partition under the decree.

Held, that the application was not barred by limitation under the provisions of the Limitation Act, Act XV of 1877, Sch. II., Art. 179, cl. 3, exp. 1.

THE facts of this case are stated as follows in the judgment appealed from: "The parties in this case were originally

* Appeal from Appellate Order No. 316 of 1882, against the order of F. W. D. Peterson, Esq., Judge of Jessore, dated the 12th July 1882, reversing the order of Baboo Monmoth Nath Chatterjee, First Munsiff of Baghat, dated the 20th May 1882.

(1) 24 W. R., 229.

plaintiffs and defendants in a partition suit, which was decided in accordance with the terms of a compromise on the 30th of January 1877. The decree showed that each of three sets into which the owners of the whole property were divided, was entitled to one-third of the property in suit, and it was decreed that if the plaintiffs did not have the partition of the lands carried out within the two months, any one of the parties, whether plaintiff or defendant, might 'execute the decree and take possession after partition.' The owners of one-third accordingly executing the decree obtained their share: then some four years after the date of the decree, another set, the respondents 1 and 2, applied for separation of their share: thereupon certain of the defendants pleaded that this second application was barred by limitation, the execution by one set of the owners not being a proceeding which kept alive the decree of all. The Munsiff found that the application for execution of the first set of proprietors prevented the decree being barred. The reason given by him is that the decree was one which should be executed with reference to all the shares on the application of one of the parties, but, inasmuch as one set of proprietors had already succeeded in obtaining a separation of their one-third share, the Munsiff seems to have understood that his interpretation of the decree could not be acted on so long as the previous execution proceedings were not impugned, and he thereupon passed an order which was clearly *ultra vires*, namely, that the entire property should now be partitioned amongst all the shareholders. The present applicants for execution advanced no such claim as that the lands already separated should again be united with the lands of the other two shares and a fresh partition carried out; but manifestly the first execution proceedings were an obstacle which would have to be surmounted somehow before the present application could be granted. As the matter stood the successful execution of a fraction of the decree was for all practical purposes equivalent to three decrees, and, if so, the execution of a separate portion of the decree by those entitled to that portion could not keep alive the decree with reference to the other portion in which the first applicants for execution had no interest." The Subordinate Judge then cited and distinguished the case of

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Sheikh Khoorshed Hosseim v. *Nubee Fatima* (1), and allowed the appeal with costs.

Thereupon an appeal was preferred to the High Court, on the ground that the Subordinate Judge was wrong in holding that the decree was barred by limitation.

Baboo *Taruk Nath Palit* and Baboo *Baikant Nath Doss* for the appellants.

Baboo *Troylukha Nath Mittra* for the respondents.

The judgment of the Court (CUNNINGHAM and MACLEAN, JJ.) was delivered by

CUNNINGHAM, J.—In this case there was a decree on compromise on the 30th January 1877, by which the parties were declared to be entitled to a partition, and it was ordered that, if the plaintiffs did not have the partition of the lands carried out within two months, any one of the parties, plaintiffs or defendants, might execute the decree and take possession after partition. The partition was not carried out forthwith, and an application was made by some of the plaintiffs to have the partition effected, and on that application, without dividing the entire property, one-third portion was separated. On the 15th March 1882 the present applicants applied for partition of the rest of the properties, that is, of the remaining two-thirds which were not partitioned. The question we have now to decide is, whether that application being made more than three years after the decree of the 30th January 1877 is kept alive by the application of some of the plaintiffs in January 1880. The lower Appellate Court has considered that it is not, inasmuch as the decree must be regarded as practically a separate decree in the interest of each of the parties. We are unable to concur in that view; we think on the whole that the proper view to be taken of the decree is that it was a joint decree, within the meaning of the second part of the explanation to Article 179 of the second schedule of the Limitation Act. We consider, therefore, that the application is not barred by limitation.

The Munsiff in passing orders on the application directed that the whole of the property should be partitioned, thus re-opening the

(1) I. L. R., 3 Calc., 551.

proceedings of January 1880. We concur with the lower Court in thinking that in doing this he was going beyond what the applicants had asked for. We think that the proper order to pass in the case is that the execution should now issue as prayed by the applicants. The present appeal must be admitted with costs.

Appeal allowed.

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MOHUN CHUNDER KURMOKAR v. MOHESH CHUNDER KURMOKAR.

Before Mr. Justice Field and Mr. Justice Norris.

UMA SUNKUR SIRKAR (DEFENDANT) *v.* TARINI CHUNDER SINGH (PLAINTIFF).*

1882. *July* 26.

Kabuliat, Construction of—Abatement of rent for land acquired by Government for public purposes.

In a suit for rent by a zemindar against a patnidar, the latter claimed abatement of the rent on the ground that part of the land included in the patni tenure had been acquired by the Government for public purposes.

The kabuliat executed by the patnidar contained a provision to the effect that, if any of the land settled should be taken up by Government for public purposes, the zemindar and the patnidar should divide and take in equal shares the compensation money, and a further provision to the effect that the patnidar should "make no objection on the score of diluvion or any other cause to pay the rent fixed or reserved by this kubuliat."

Held that the patnidar was entitled to abatement of the rent.

IN this suit the plaintiff (zemindar) sued the defendant (patnidar) for rent calculated at the full rate fixed by the patni settlement. The defendant's claim for abatement having been rejected by both the lower Courts, the defendant appealed to the High Court.

Baboo *Kashi Kant Sen* for the appellant.

Baboo *Bhowany Churn Dutt* for the respondent.

The following judgments were delivered :—

FIELD, J.—The question in this case is concerned with the construction of a patni kabuliat.

Some land included in the patni was taken up by Government

* Appeal from Appellate Decree No. 478 of 1881 against the decree of Baboo Amrito Lall Chatterjee, Subordinate Judge of Nuddea, dated the 29th December 1880, affirming the decree of Baboo Behari Lal Banerjee, Second Munsiff of Kooshtea, dated the 1st August 1879.

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for public purposes, and the patnidar now claims abatement of rent from the zemindar in respect of the land so taken. The contention of the zemindar is that the patnidar is, by an express covenant contained in the patni kabuliat, debarred from making any such claim for abatement. The patni kabuliat first contains an agreement to the following effect: that if land be taken up by Government for a railway, a ferry fund or other purposes, the zemindar and the patnidar shall divide the compensation paid by Government in respect of such land, each receiving one moiety. There is then a further clause which may be roughly translated as follows: "I shall make no objection on the score of diluvion or any other cause to pay the rent fixed or reserved by this kabuliat." I propose to construe this second clause first; and the question which I have to decide is, whether the taking of land for public purposes by Government is a cause of the same kind as diluvion. If this question is to be answered in the affirmative, then this particular clause in the kabuliat precludes the patnidar from claiming abatement of rent. It appears to me that the taking of land by Government for a public purpose is not a cause of the same nature as diluvion; and for this reason. When land is washed away by the action of the river, the thing itself out of which the rent issues is destroyed, certainly for a time, although it is quite possible that by the action of the same river there may be a re-formation. But in the case of a re-formation the custom of this country is, that where abatement has been allowed for diluvion, enhancement is claimable for alluvion. When land is taken up by Government, the thing itself out of which the rent issues is not destroyed; it continues to exist and the Government pays what must be taken to be the market value of the land at the particular time. It, therefore, appears to me that it is impossible to say that the taking of land by Government for public purposes is a cause *ejusdem generis* (of the same kind) with diluvion. This disposes of the second clause.

I now proceed to deal with the first clause. As to the meaning of this clause there can be no possible doubt. The parties agreed that the zemindar should receive one moiety of the compensation, and the patnidar the other moiety. There is no express covenant as to whether there shall be an abatement of rent or not.

We have then to consider whether it is equitable that the zemindar having received a portion of the compensation money, in other words, having received to a certain extent the value of the annuity which he has reserved out of the land demised by the patni lease, should be entitled to continue to receive the whole of that annuity without diminution. It appears to me that this would not be equitable; and that where the zemindar receives a portion of the compensation money, it is reasonable that he should grant an abatement of the patni rent to the patnidar. I take it that the stipulation in the patni kabuliat was intended merely to be a solution of a question which constantly arises in compensation cases, and which it is extremely difficult to decide without a measurement of the whole area of the patni tenure, in other words, that it was intended to settle, as between the zemindar and the patnidar, the principle upon which the compensation for land taken up by Government for public purposes should be apportioned between the parties. In many cases the patnidar's interest is of more value than the zemindar's interest, and there are probably few cases in which the zemindari interest would exceed the value of the patni interest. I take it therefore that this stipulation, that the parties should divide the compensation money in equal moieties, is an agreement between them merely as to the apportionment of the compensation, and that it was not intended to lay down any rule between these parties as to abatement of rent, which must be taken to be left to the general law of the country; and I think that as the patnidar has suffered a diminution of the area of the thing demised to him, he is entitled to an abatement of the patni rent payable by him. The case must therefore go back to the Court of first instance in order that that Court may decide what is a reasonable abatement under the circumstances. The costs of all Courts will abide the result.

NORRIS, J.—I am of the same opinion. In construing this document it cannot reasonably be held that the taking of part of the land by the Government for the purposes of a railway is *ejusdem generis* with land abating or increasing by reason of diluvion and alluvion, or, in other words, by the act of God; and I am strengthened in coming to this conclusion when it is manifest that there

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was present before the minds of the parties, at the time the patni settlement was granted by the plaintiff, the fact that Government was likely to take a portion of the land included in the settlement for the purposes of a railway; and if the parties intended that there should be no abatement of rent when Government exercised their powers, in addition to making an express provision for the distribution of the compensation money, they would have further stated that there would be no abatement of rent. I am of opinion that the true construction of this document is that the parties intended by an arrangement between themselves, to arrive at a conclusion, as to how the compensation money paid by Government should be divided between the parties. The relation of zemindar and patnidar may be taken as that of lessor and lessee. The lessee in 99 cases out of 100 has a beneficial occupation, and in so far as he has the beneficial occupation, he is entitled, when turned out of a part of his holding, to be compensated for the loss he suffers by reason of such eviction. The zemindar also, who answers to the lessor or free-holder, is entitled to be paid for the land actually taken, and instead of calling into play some abstruse method of calculation, the parties agreed as to the proportions in which the lessee should be compensated for the loss of his leasehold interest in the land, and the zemindar for his freehold interest. After the question of compensation has been determined, there still remains the question of the quantum of abatement in the rent which the lessor should allow the lessee. In England a machinery is provided. In the Lands Clauses Act there exists a machinery for the settlement of the abatement. It is a matter of calculation, and if the parties cannot agree, provision is made for the settlement of the amount by justice. No such machinery exists in this country, and I am therefore of opinion that the case must be remanded as directed by my learned brother.

Appeal allowed and case remanded.

Before Mr. Justice Mitter and Mr. Justice O'Kinealy.

IN THE MATTER OF THE PETITION OF DUTTO SINGH AND OTHERS *

DUTTO SINGH AND OTHERS *v.* DOSAD BAHADUR SINGH

1883 *January* 17.

Arbitration—Award—Time to file an award—Limitation—Limitation Act (XV of 1877,) Sch. II, Cl. 176—Civil Procedure Code, 1877, ss. 525, 526—Powers of Court—Cause shown against filing award, Validity of—Powers of Arbitrators—Review of Award.

Where an award was made and signed by the arbitrators on the 5th of August 1881, but was not delivered to the parties till the 13th of September following, *semble*, that an application to file the award, made on the 25th of February 1882, under the provisions of s. 525 of the Code of Civil Procedure, was not barred by limitation. It is clearly the intention of the Legislature that a party to an arbitration should have six months to enforce the award under s. 525 of the Code of Civil Procedure, from the time when he is in a position to enforce it.

Under ss. 525 and 526 of the Code of Civil Procedure, the Court has full power to enter into the question of the sufficiency of the cause shown against the filing in Court of an award.

Dandekar v. *Dandekars* (1) followed; *Ichamoyee Chowdhranee* v *Prosunno Nath Chowdhri* (2) dissented from.

After an award has been made and handed to the parties the functions of the arbitrators cease. They have no power afterwards to deal with an application for review of their decision.

IN this case it appeared that Dutto Singh and others (hereafter spoken of as Dutto Singh) agreed to refer to arbitration certain disputes which they had with Dosad Bahadur Singh and others (hereafter spoken of as Dosad Bahadur Singh). The arbitrators made their award on the 5th of August 1881 in favour of Dosad Bahadur Singh, in consequence of which the opposite party applied to the arbitrators for a review of their decision on the 16th of August 1881. Pending the consideration of this application by the arbitrators and on the 28th of November 1881, Dosad Bahadur Singh applied to the Court of the Munsiff of Tajpore in Tirhoot under s. 525 of the Civil Procedure Code to have the award filed in Court. Dutto Singh having been called upon to show cause, objected that the arbitrators had not yet passed any

*Rules Nos. 1033 and 1202 of 1882, against the order of Moulvi Mahomed Noorul Hossain, Munsiff of Tajpore, dated the 30th June 1882.

(1) I. L. R., 6 Bom., 663. (2) *Ante*, p. 557.

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order on his application for review, and on this ground the application to have the award filed in Court was dismissed on the 9th of January 1882.

On the 17th of January 1882, the arbitrators rejected Dutto Singh's application for review, and on the 25th of February 1882, Dosad Bahadur Singh made another application to have the award filed in Court. Dutto Singh showed cause on the ground, amongst others, that the application for review had been improperly rejected. On the 30th of June 1882, the Munsiff remitted the case to the arbitrators on the ground that the application for review had been improperly rejected.

RULE No. 1033 OF 1882.—On the 22nd of August 1882, Dutto Singh applied to the High Court for a rule calling upon Dosad Bahadur Singh to show cause why the Munsiff's order of the 30th of June should not be set side on the following grounds: (1), that the application to have the award filed in Court was barred by limitation; (2), that the Munsiff had no jurisdiction to make the order objected to; (3), that the arbitrators having been guilty of misconduct in making the award, and in refusing the application made to them to reconsider it, the Munsiff should have refused to interfere in any way and should have simply refused to file the award; (4), that the award should have been set aside under the provisions of s. 526 of the Civil Procedure Code, or the parties left to a civil suit.

RULE 1202 OF 1882.—After the previous rule had been issued Dosad Bahadur Singh applied to the High Court for a rule calling upon Dutto Singh to show cause why the Munsiff should not be ordered to file the award.

Both rules were heard together.

Mr. *Twidale* showed cause against Rule No. 1033, and supported Rule 1202.

Mr. *C. Gregory* showed cause against Rule 1202, and supported Rule No. 1033.

The judgment of the Court (MITTER and O'KINEALY, JJ.) was delivered by

MITTER, J.—These two rules arise out of a proceeding held in the Munsiff's Court of Tajpore under the provisions of

ss. 525 and 526 of the Civil Procedure Code. It appears that certain matters in dispute between the parties to these two rules were referred to arbitration without the intervention of a Court of Justice. The arbitrators made their award on the 5th of August 1881; but it was not handed over to the parties till the 13th September following. The petitioners in Rule No. 1033 being dissatisfied with the award, in the meantime filed, on the 16th of August, a petition of review before the arbitrators.

While this petition of review was pending, the petitioners in Rule No. 1202 under s. 525 of the Civil Procedure Code, applied to the Munsiff of Tajpore, who had jurisdiction over the matter, to have the award filed in Court. On notice being given to the petitioners in Rule No. 1033, who were the parties to the arbitration other than the applicants under s. 525, they raised various objections, some of which undoubtedly come within the provisions of ss. 520 and 521 of the Civil Procedure Code; but the Court without determining any of them refused the application on the 9th January 1882 solely on the ground that an application for review was then pending before the arbitrators.

On the 7th January 1882, the application for review was rejected. The petitioners in Rule No. 1202 again applied to the Court on the 25th February 1882 to have the award filed in Court under s. 525. Again the parties other than the applicants, on notice being given, urged various objections, which were disposed of by the Court on the 30th June 1882.

One of the objections urged against the award being filed in Court was that the application dated the 25th February 1882 was out of time, under Art. 176 of the Limitation Act, which lays down that an application under s. 525 of the Civil Procedure Code should be made within six months from the date of the award. The Court overruled this objection on the ground that the six months should be counted from the date when the award became final, and that the award did not become final till the application for review was disposed of.

Another objection against the award was that the arbitrators were guilty of corruption. The Court overruled it, finding that this charge was not established.

But the Court, being of opinion that the application for

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review had not been duly considered by all the arbitrators, remitted the award to them to deal with the application for review according to certain directions contained in the judgment. The petitioners in Rule No. 1202 contend that the order remitting the award is erroneous; that the Court, having regard to its finding upon the other objections, should have ordered the award to be filed in Court. The petitioners in the other rule contend that the decision of the lower Court on the question of limitation is erroneous; and that it having come to the conclusion that the proceedings of the arbitrators were not regular should have rejected the application at once.

The first question that we have to decide is, whether the application of the 25th February 1882 was barred under the provisions of Art. 176 of the Limitation Act. The order of the lower Court in this case is not appealable, and the rules were obtained under the provisions of s. 622 of the Civil Procedure Code. Supposing that the decision of the lower Court on the question of limitation is erroneous in law, it might be doubtful whether it would bring the case within the purview of s. 622 of the Civil Procedure Code. However, if it were necessary for us to decide this question, we would follow the opinion expressed by Couch, C.J., in *Sreenath Chatterjee* v. *Koylash Chunder Chatterjee* (1) "that the word 'date' does not mean the day written in the award, as when it was made, but the time when it is given to the parties, when it becomes an award and is handed over to them, so that they may be able to give effect to it." An award may be made and dated the day it is written and signed by the arbitrators. It may then remain in the hands of the arbitrators for more than six months In a case like this it would be unreasonable to hold that the six months should count from the "date" written in the award.

It is clearly the intention of the Legislature that a party to an arbitration should have six months to enforce the award under s. 525 of the Civil Procedure Code from the time when he is in a position to enforce it.

It has been next urged in support of Rule No. 1033 that when objections were taken to the filing of the award in Court,

(1) 21 W. R, 248.

and when some of these objections came within ss. 520 and 521 of the Civil Procedure Code, the lower Court should have dismissed the application under s. 526. It has been contended before us that a Court under ss. 525 and 526 cannot enter into the question of the validity of the cause shown against the filing in Court of an award; that whenever any of the grounds mentioned or referred to in s. 520 or s. 521 are alleged, the Court must refuse the application holding that sufficient cause has been shown why the award should not be filed within the meaning of ss. 525 and 526. In support of this contention the case of *Ichamoyee Chowdhranee* v. *Prosunno Nath Chowdhri* (1) has been relied upon. The learned Judges who decided that case gave different reasons for their decision. No doubt the judgment of Wilson, J., fully supports this contention; but with great deference to his opinion we are unable to agree in that view. In *Dandekar* v. *Dandekars* (2) a contrary view of the ss. 525 and 526 has been taken. We do not think it necessary to go into the reasons of our decision upon this point, as we do not find that we can add anything to those given in the Bombay decision cited above. This objection must also therefore fail.

In Rule No 1202 it has been urged that the lower Court is in error in remitting the award to the arbitrators to reconsider the application for review against it. We are of opinion that this contention is valid. After the award was made and handed over to the parties, the functions of the arbitrators ceased. They had no power afterwards to deal with any application for review.

Therefore, the ground upon which the first application was disposed of by the lower Court was erroneous. We, therefore, set aside both the orders of the 9th January and 30th June 1882, and send back the record to the lower Court to deal with the objections taken to the filing of the award according to law. We allow no costs in either of the Rules.

Orders set aside.

(1) *Ante* p. 557.
(2). I. L. R., 6 Bom., 663.

FULL BENCH REFERENCE.

Before Sir Richard Garth, Knight, Chief Justice, Mr. Justice Mitter, Mr. Justice McDonell, Mr. Justice Prinsep and Mr. Justice Wilson.

1883 *February* 28.

JANOKI NATH MUKHOPADHYA (PLAINTIFF) *v.* MOTHURANATH MUKHOPADHYA AND OTHERS (DEFENDANTS).*

Hindu law—Bengal School of Hindu law—Widow's estate—Joint widows—Partition—Alienation—Purchaser from Hindu widow.

Where a Hindu governed by the Bengal School of Hindu law dies intestate leaving two widows his only heirs him surviving, either of those widows may sell her interest in her deceased husband's property, and the purchaser thereof is entitled to enforce a partition as against the other widow.

The partition if decreed should be effected in such a way as would not be detrimental to the future interests of the reversioners.

THE facts of the case are thus stated in the judgment of the Court of first instance: "The plaintiff alleges that he has purchased the half share of a piece of land and a house standing thereupon, belonging to one Rajnarain Mukerji, an inhabitant of Santipur, who died intestate in August 1872, leaving two widows, Prosunnomoyi and Brojo Sunduri, as his only heirs-at-law. Plaintiff's purchase was made from Brojo Sunduri, the younger widow, who sold her interest ostensibly for the purpose of providing her maintenance. The purchase deed is dated the 10th of August 1878. This suit has been brought by the plaintiff for the enforcement of partition of the disputed premises against the senior widow as well as against four kinsmen of the deceased (his cousin's sons) who have been in possession thereof since the death of Rajnarain. The senior widow has not appeared in this case. The suit is defended only by the defendant No. 4, one of the four kinsmen mentioned above." The Munsiff dismissed the suit on the ground that the plaintiff's vendor had no power to convey her interest to the plaintiff, and that neither she nor the plaintiff as her representative was entitled to enforce partition of the joint estate as against the other widow. This decision was upheld on

* Full Bench Reference made by Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Mitter, in Appeal under s. 15 of the Letters Patent in Appeal from Appellate Decree No. 522 of 1882.

appeal to the District Judge, and again upheld on second appeal to a single Judge of the High Court.

The arguments on which these decisions were based were to the effect that by Mitakshara law widows take a single estate, and that there can be no alienation by one without the consent of the other—*Bhugwandeen Dobey* v. *Myna Baee*, (1); *Gajapathi Nilamani* v. *Gajapathi Rashamani*, (2), unless on the ground of legal necessity; and that the same principle was applicable to the Bengal School of Hindu law—*Amrito Lal Bose* v. *Rajonee Kant Mitter*, (3); *Maniram Kolita* v. *Keri Kolitani*, (4). The plaintiff appealed to a Division Bench of the High Court (GARTH, C.J., and MITTER, J.) who referred the question to a Full Bench with the following opinion :—

This is a suit for possession after partition of two plots of land and the building upon them. One of those plots exclusively belonged to one Rajnarain Mukerji, who held a half share in the other, the defendants Nos. 2, 3, 4 and 5 being entitled to the other half. Rajnarain died leaving him surviving two widows, Prosunnomoyi Dabi and Brojo Sunduri Dabi. The plaintiff's case is that he has purchased Brojo Sunduri's interest in the property in dispute under a conveyance executed by her.

The Courts below dismissed the suit upon two grounds :—

First, that the interest of Brojo Sunduri in her husband's property was not alienable; and, *secondly*, that neither Brojo Sunduri nor the plaintiff can legally enforce a partition of her husband's estate, so as to separate her share from that of the other widow.

The learned Judge in this Court has confirmed the decision of the lower Courts upon both these grounds. It has been argued before us that the learned Judge in this Court is not right in holding that the questions raised in the case are concluded by decisions of the Privy Council. We think that there is considerable force in this contention, and as those questions are of general importance, we think it desirable to obtain an authoritative ruling

(1) 11 Moore's I.A., 487.
(2) I. L. R., 1 Mad., 290; L. R. 4 I A., 212.
(3) L. R., 2 I. A., 113; 15 B. L. R., 10.
(4) I. L. R., 5 Calc., 776.

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of a Full Bench upon them. We, therefore, refer the following questions for the decision of a Full Bench:—

First.—Whether under the Hindu law in force in Bengal, Brojo Sunduri's alienation of her interest in her husband's estate is valid?

Second.—Whether the plaintiff or Brojo Sunduri is entitled to a partition of the property in suit?

Baboo *Gurudas Banerji* for the appellant.

Baboo *Srinath Das* for the respondents.

The judgment of the Full Bench was delivered by—

MITTER, J.—We are of opinion that both these questions should be answered in the affirmative.

It is now settled law that the interest of a Hindu widow may be alienated by her, and that the alienation would be valid for her life. In cases of necessity, such as are mentioned in paras. 61 and 62, s. 1, chap. XI of the Dyabhaga, she may effect even an absolute alienation to enure after her death. If there were no provisions to the contrary, the right of alienation of the interest of one of two or more widows jointly inheriting their husband's estate would logically flow from these two propositions. So far as the doctrines of the Hindu law prevalent in the Lower Provinces of Bengal are concerned, there does not, in our opinion, exist any such contrary provision.

One of the cardinal points of difference between the Mitakshara and the Dyabhaga is, that according to the latter the right of alienation being a necessary incident of ownership, one of two or more joint owners can alienate his interest in the joint property without the consent of the co-parceners.

The author of the Mitakshara relying upon certain texts of Vyasa, in para. 30, chap. 1, s. 1, lays down the rule of law that, "among unseparated kinsmen the consent of all is indispensably requisite, because no one is fully empowered to make an alienation since the estate is in common."

"But the texts of Vyasa," says Jimuta Vahana, "exhibiting a prohibition, are intended to show a moral offence: since the family is dis-

Dyabhaga, p. 36.

tressed by a sale, gift or other transfer, which argues a disposition in the person to make an ill use of his power as owner. They are not to invalidate the sale or other transfer.

"So likewise other texts (as this 'though immovables or bipeds have been acquired by a man himself, a gift or sale of them *should* not *be made* by him, unless convening all the sons') must be interpreted in the same manner. For here the words 'should' 'be made' must necessarily be understood.

"Therefore since it is denied that a gift or sale should be made, the precept is infringed by making one; but the gift or transfer is not null: for a fact cannot be altered by a hundred texts." (Dyabhaga, chap. II, paras. 27 to 30.)

It is clear therefore that according to the Dyabhaga, the right of alienation is in no way affected by the joint inheritance of two or more widows in their husband's estate.

As regards the second question, the right of enforcing partition is also clearly laid down in the *shastras*. The passage from the Mitakshara which bears upon this point is not fully translated as has been pointed out in page 451, Madras High Court Reports, Vol. III. It is to the following effect: "There (in that order) the first to inherit is the wife *patni*. *Patni* is she who is (so) made by marriage, and this from the Smriti or rule of Grammar 'Patyur-no yagna Sumyogai.' (The particle *ni* is added to *pati* to signify one who partakes in the holy sacrifice) singular number, because the class is denoted. Hence, if there be several, whether of the same or different castes they divide and take the property according to their shares."

In page 132 of the Viramitrodya, the same rule of law is thus laid down: "First of all the *patni* or the lawfully-wedded wife takes the estate. The term *patni* itself signifies a woman espoused in the prescribed form of marriage, agreeably to the aphorism of Panini. 'The term *pati* (husband) is changed into *patni* (meaning the correlative) implying relation through a sacrifice.' The singular number (in the term *patni* in Yagisvara's text 1) implies the class, hence if a person leaves more wives than one, then all of them, first those of the same class (with the husband), and after them those of a different class, shall take the husband's property dividing the same amongst themselves."

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In the Dyabhaga, there is no special provision of this nature in the chapter on the widow's succession; but the right of partition is provided for in all cases of joint inheritance by the following passages: "First, the term partition of heritage (Dyabhaga) is expounded, and on that subject Nareda says: "Where a division of the paternal estate is instituted by sons, that becomes a topic of litigation called by the wise Partition of Heritage. What came from the father is 'paternal,' and this signifies property arising from the father's demise. The expressions 'paternal' and 'by sons' both indicate any relation, for the term 'Partition of Heritage' is used for any division of the goods of any relation by any relatives." Chap. I. paras. 2 and 3.

"Since any one parcener is proprietor of his own wealth, partition at the choice even of a single person is thence deducible; and concurrence of heirs, suggested as one case of partition, is recited explanatorily in the text the brethren being assembled, &c." Chap. I. para. 35.

Upon these passages it is quite clear that in the case of a joint succession of two or more widows to their husband's estate, the partition may be enforced at the instance of any one of them.

So far then as the original treatises go, they clearly recognize the right of alienation by one of two or more widows jointly succeeding to their husband's estate, and of enforcing partition of the joint heritage.

But it has been urged that these questions have been decided by the Judicial Committee of the Privy Council in a contrary way.

The first of the cases cited before us is *Bhugwandeen Dobey* v. *Myna Baee* (1). The facts of that case are these: One Rae Dina Nath died, and his estate was inherited by his two widows, Myna Baee and Dula Baee. The latter died leaving her share of the heritage, which had been separated under an order made by a Judge in a summary suit pursuant to Act XIX of 1841, to her father and brother under a will executed by her before her death. The Judicial Committee of the Privy Council held (1) that under the Mitakshara law which governed the case, the will was invalid against the surviving widow who

(1) 11 Moore's I. A., 487.

was entitled to succeed to the property in suit by right of survivorship; (2) that there was no severance of the joint tenancy of the two widows; and (3) that there could not be a partition between them, *so as to affect the right of survivorship of either*. Their Lordships closed their judgment with the observation, that the case might have been decided upon the single ground that in a joint estate the alienation of the interest of one co-parcener without the consent of the rest is invalid.

It will appear from this analysis of the decision, that it does not bear upon the questions before us. It was not decided there that there could be no partition between the widows binding between them during their lifetime; but what was held was, that any such partition would not affect the right of survivorship of either. This is all that was decided in that case upon the question of partition, and the decision in *Gajapathi Nelamani* v. *Gajapathi Rashamani* (1) following the first-mentioned case only reaffirmed that proposition. As regards the observations upon the question of the right of alienation, they are entirely based upon the Mitakshara law; but it has been already shown that upon this point the law, as laid down in the Mitakshara, is different from that of the Dyabhaga.

The last case cited is *Amrito Lal Bose* v. *Rajonee Kant Mitter* (2). This is a Bengal case, and all that it decides is, that between widows jointly succeeding to their husband's estate, as well as between daughters jointly inheriting their father's property, there is right of survivorship.

We are, therefore, of opinion that the contention that those decisions have laid down the law contrary to our opinion expressed above is not correct.

On the other hand, in *Srimati Paddamani Dasi* v. *Srimati Jaggadamba Dasi* (3) (which was a case of succession of two daughters), it was held that either of them was entitled to enforce partition, although such partition might not be binding on the reversioners.

(1) I. L. R., 1 Mad. 290: L. R., 4 I. A., 212.
(2) L. R., 2 I. A., 113: 15 B. L. R., 10.
(3) 6 B. L. R., 134.

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There remains to notice the case cited before us of *Kathaperumal* v. *Venkabai* (1); but with deference to the learned Judges who decided it, it seems to us that their decision was based upon a misapprehension of the Privy Council cases referred to above. The learned Judges were of opinion that according to those decisions there could not be *any* kind of partition between two widows jointly inheriting their husband's property. We have already shown that the judgments of the Privy Council do not go to that length.

We are, therefore, of opinion that the decisions of the lower Courts are erroneous. We accordingly reverse them, and remand the case to the Munsiff to decide the remaining issues. We think it right to observe here that if a partition be ultimately decreed, it should be effected in such a way as would not be detrimental to the future interests of the reversioners.

APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

1883 *February* 6.

PARBUTTY DASSI (PLAINTIFF) *v.* PURNO CHUNDER SINGH AND OTHERS (DEFENDANTS).*

Evidence Act (I of 1872,) s. 35.—Admission—Statement in Decree—Practice of Mofussil Courts.

In a suit for possession of a fishery, the plaintiff sought to put in evidence an admission alleged to have been made in the year 1818 by the defendant's predecessor in title in a written statement in a former suit The only evidence of the admission was that contained in the decree in the former suit, the ordinary part of which was prefaced with a short statement of the pleadings in the suit. Under the old practice of Mofussil Courts, it was the duty of the Court to enter in the decree an abstract of the pleadings in each case.

Held, that the statement in the decree was evidence of the admission under s. 35 of the Evidence Act (Act I of 1872.)

Lekraj Kuar v. *Mahpal Singh*, (2), referred to.

* Appeal from Appellate Decree No. 105 of 1882, against the decree of Baboo Promotho Nath Mookerjee, Additional Subordinate Judge of East Burdwan, dated the 29th October 1881, reversing the decree of Baboo Janoki Nath Mookerji, Munsiff of Cutwa, dated the 30th June 1880.

(1) I. L. R., 2 Mad., 194.
(2) I. L. R., 5 Calc., 744.

In this case the plaintiff stated that her late husband purchased a patni mehal, lot Mowgram, at an auction sale for arrears of rent held under the provisions of Act VIII of 1819, on the 14th of May 1874; that as the heir and representative of her husband she was entitled to a four annas share of a julkur included in the said patni mehal; and that from this julkur she had been dispossessed by the defendants. She prayed for a declaration of her right to possession, and that possession be awarded to her. The main issue was whether the julkur was in point of fact included within the patni mehal; and in support of her case the plaintiff tendered in evidence a "decree in suit No. 617 of 1818, instituted in the Civil Court of Birbhum by No. 2 defendant's predecessor, Boidya Nath Ghose, against the plaintiff's predecessors, patnidars, Enatulla and Ajmatulla Chowdhry, and No. 1 defendant's predecessor, Rashmoni Dasi." This document was drawn up in the manner formerly used in the mofussil, *i.e.*, it contained an abstract of the plaint and written statements of the parties, together with the judgment and the decree proper, and in the abstract given of Rashmoni's defence appeared an admission that the julkur claimed in the present suit belonged to plaintiff's mehal. In reference to this document the Court of first instance said: "This decree is conclusive evidence between the parties; and even if it was not so, it is a very good piece of evidence as declaring the right of the parties at such a distant date." He then decreed the plaintiff's claim and the defendants appealed. On appeal, the Subordinate Judge said:—

The lower Court has given a decree to the plaintiff, solely relying on a decree No. 617 of 1818, but it does not appear to me to be legally admissible as evidence against the present defendants In that case one Boidya Nath Ghose, former patnidar of lot Sitahati, was plaintiff, and Enatulla Chowdhry, predecessor in title of the present plaintiff, and Rashmoni Dasi, were defendants. It is said that Rashmoni Dasi then held the property which the defendants now own; hence Rashmoni must be considered to be predecessor in title of the defendants; but, assuming this to be true, it does not appear that the plaintiff's predecessor Enatulla and Rashmoni had any question decided between them in that suit. On the other hand, it appears that they were both in the same category of defendants, and made a common defence. Under such circumstances, the decree cannot be conclusive against the defendants, and under the late Full Bench ruling (2) it

(2) *Gujju Lall* v. *Fattch Lall*, I. L. R., 6 Calc., 171.

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is no evidence at all against them. It has been argued that the substance of Rashmoni's defence embodied in the decree should at least be accepted as an admission and should be binding on the defendants; but if the plaintiff wanted to use the defence as an admission, she ought to have produced the same in original, and any substance of it given in the decree cannot be accepted as legal evidence.

The Subordinate Judge then reversed the decision of the Court of first instance. The plaintiff appealed to the High Court on the grounds that the decree of 1818 was binding on the parties, and that, even if not binding, the statement of Rashmoni's defence contained therein was evidence against the defendants in the present case.

Baboo *Ilem Chunder Banerjee* and Baboo *Umbica Churn Banerjee* for the appellant.

Baboo *Mohiny Mohun Roy* and Baboo *Taruck Nath Palit* for the respondents.

The judgment of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

PRINSEP, J.—In this case the plaintiff, as representative of her late husband, claims to hold a three annas, eighteen and three-fourth gundahs share in a certain julkur called Noa Bawarkati as appertaining to a patni mehal purchased by her husband at a sale held under Regulation VIII of 1819.

The defendants deny that the disputed julkur appertains to the plaintiff's taluk, and assert that it appertains to Jote Gossain appertaining to Mouzah Narainpore.

The Moonshee decreed the suit. He based his judgment partly on a Civil Court Decree, No. 617 of 1818, and, interpreting it with the light of an Ameen's report in a former case, decided that the plaintiff was entitled to the property, and accordingly gave her a decree.

On appeal the Subordinate Judge decided that that decree could not be admitted in evidence between the parties to the present suit. He then went on to say that even if one of the parties to that suit, namely Rashmoni, could be considered as the predecessor in title of the present defendants, her admission

entered in the decree was not admissible in evidence and could only be proved by production of the original. Further, he decided that the Ameen's report in the former case could not be treated as evidence in the present suit.

Against that decision the plaintiff has appealed to this Court, and it has been contended that the Subordinate Judge has committed an error in law in rejecting the decree and admission, and in not taking cognizance of certain other decrees on the record.

The present plaintiff is a purchaser of the taluk for arrears of rent. She therefore holds it free from all encumbrances created by previous talukdars and cannot be bound by any act of theirs. The decrees to which she refers could not be used as evidence against herself; and it seems to us clear that if they could not be used as evidence against her, she cannot use them as evidence against the defendants; but in regard to the point whether the plaintiff was bound to prove the admission by production of the original, we differ from the view taken by the Subordinate Judge. There can be no doubt that the production of the original was impossible. If there was any original it was destroyed years and years ago. By s. 35 of the Evidence Act an entry in a public record stating a fact in issue, or relevant fact, and made by a public servant in the discharge of his official duty, is admissible in evidence. In this case the admission in the decrees is no doubt a relevant fact; and the only question for decision is whether it falls within the other portion of s. 35. At the time that these decrees were recorded it was the universal practice in Lower Bengal to write all proceedings on one side of a long roll of paper. This practice is referred to in Circular No. 131, dated 3rd May 1851. Previous to the issue of that Circular the Sudder Dewany of the Lower and Western Provinces issued a Circular on the 12th February 1847, from which it appears that it was the duty of the Court, and indeed had been the practice, to enter in the decree an abstract of all the pleadings. So far there seems no reason to doubt that these entries were made by the officers of the Court in discharge of their official duties. The question as to the effect of s. 35 of the Evidence

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Act was lately before the Judicial Committee of the Privy Council in the case of *Lekraj Kuar* v. *Mahpal Singh.* (1) In that case the question arose whether a statement made in a settlement rubokari, recorded in the province of Oudh, in which place officers were directed to be guided by the spirit of the Settlement Regulations, but were not bound by them, was admissible in evidence under this section. It was there argued that the precise information in the rubokari was not directed by any particular regulation, and that the settlement records were prepared and attested by subordinate officers and could not be accepted as in any way invalidating the records themselves. But their Lordships of the Privy Council in overruling these objections said as follows: "It is necessary to look at the precise terms of this section, and for the present purpose it may be read: 'an entry in any official record stating a fact in issue, or relevant fact, and made by a public servant in the discharge of his official duties, is itself a relevant fact.' There can be no doubt that the entries in question supposing them to bear the construction already given to them, state a relevant fact, if not the very fact, in issue, *viz.*, the usage of the Bahrulia Chur. If so, then the entry having stated that relevant fact, the entry itself becomes by *force of the section a relevant fact,* that is to say, it may be given in evidence as a relevant fact, because, being made by a public officer, it contains an entry of a fact which is relevant." In the present case it is not contended, and indeed could not be contended, that the admission in these decrees is not relevant. Following the words of their Lordships of the Judicial Committee we think that the admission made in these decrees could be proved by the production of the decrees; and that it is not necessary that the plaintiff should be placed in the position of doing what everybody knows is impossible for him to do, namely, to produce the original decrees.

In this view of the case we think that the Subordinate Judge was wrong in saying that so much of the decree was not admissible as legal evidence. Whether the defendants are bound by the statements of Rashmoni depends on the question whether Rashmoni was their predecessor in title; and this point has not

(1) I. L. R., 5 Calc., 744

been decided by the Subordinate Judge. If he holds that the defendants do not represent Rashmoni, neither the decrees nor the admission can be admissible against them. On the other hand if he holds that the defendants do represent Rashmoni then, in our opinion, so much of the decrees as purports to give the statement of Rashmoni is admissible in the present case. The amount of weight to be given to such statement is a matter to be decided by the Court below.

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The costs of this appeal to follow the result of the case.

Case remanded.

Before Mr. Justice Mitter, Offg. Chief Justice and Mr. Justice Maclean.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT) v. RASBEHARY MOOKERJEE AND OTHERS (PLAINTIFFS).*

1882 *September* 12.

Sale for arrears of Revenue—Revenue-paying Estate—Sale of share of an estate—Recorded Proprietors—Omission of names of Proprietors—Irregularity—Act XI of 1859, *ss.* 6, 33.

When a notification of sale of a share in a revenue-paying estate is issued under s 6, Act XI of 1859, the circumstance that such notification does not contain the names of all the recorded proprietors of the share, but only the name of one of them, does not amount to an irregularity within the meaning of s. 33, Act XI of 1859.

THIS was a suit instituted by the plaintiffs to set aside a sale of a share of an estate of which they were part owners, which was held by the Collector of Burdwan for arrears of Government revenue due on the share. The Secretary of State for India in Council, the purchaser at the auction sale and the remaining co-sharers of the plaintiff were made defendants. The material facts of the case are as follows :—

(1) That Aima Mungulpore, which bore a sudder jumma of Rs. 58-14-5, was recorded in the towzi as estate No. 1312. (2) That defendants Nos. 8 and 9 had a separate account opened for their share, the revenue payable by them being Rs. 20-12.

* Appeal from Appellate Decree No. 791 of 1881 against the decree of Baboo Brojendro Coomar Seal, Additional Judge of East Burdwan, dated the 19th February 1881, reversing the decree of Baboo Bhoopoty Roy, Subordinate Judge of that district, dated the 20th November 1880.

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(3) That the remaining portion of the estate belonged to the plaintiffs and the defendants Nos. 3 to 7, whose names appear in the towzi as the recorded proprietors, and the sudder jumma payable by them was Rs. 38-2-5. It is this share of the estate which has been sold. (4) That the arrears for which the property was sold were only Rs. 5-3. (5) That the plaintiffs and defendant No. 7 had paid the revenue payable by them. The said amount of Rs. 5-3 was payable by defendants Nos. 3 to 6. (6) That the property sold was worth Rs. 4,000, but it fetched Rs. 1,350 only at the sale. It was alleged by the plaintiffs that the sale was made contrary to the provisions of the sale law, and that, therefore, they had sustained substantial injury. Of the irregularities complained of, the only one material for the purposes of this report, is the following, namely: "That the notification under s. 6, Act XI of 1859 was defective, inasmuch as it did not give the names of the plaintiffs and of defendants Nos. 3 to 7, who were the recorded proprietors, but the name of one Talebulla, a dead man, was shown as the person from whom the arrear was due."

In his judgment in the case the Subordinate Judge said :—

"It will be observed that s. 6 of the Act does not require that the name of the defaulter should be inserted in the notification of sale. The notification shall specify the estate or share of an estate to be sold. There is valid reason why the law does not require the name of the defaulter to be specified in the notice. The sale conveys the estate or share of estate in arrear, and not the right, title and interest of the defaulter. The pleader for the plaintiffs referred to the form of the sale certificate, which states the name of the late proprietor, and argues that it was the intention of the Legislature to insert the name of the defaulter in the notification of sale. I do not subscribe to this argument. Section 6 of the Act, which lays down the procedure before sale, does not require that the name of the defaulter should be specified. Upon these grounds I do not find it was an omission causing an illegality to vitiate the sale."

The decree-holder appealed to the District Court. The judgment of the learned Judge on this portion of the case is as follows :—

"Then the question is whether, when the debt is due from A, if it is notified that it is due from B, is that or is that not an irregularity as contemplated by s. 33 of Act XI of 1859. Now s. 6 rules that the notification shall specify the estate. The Commissioner and the Subordinate Judge hold that when the number, the name of the property,

and the sudder jumma were correctly given, it does not matter whether the name of the recorded proprietor was correctly given or not. The question is, is that the law? There is no definition of 'estate' in Act XI of 1859, but there is one in Beng. Act VII of 1868, and s. 30 of that Act says: 'This Act shall be read with and taken as part of Act XI,' so that the word 'estate' in s. 6 of Act XI has been used in the sense in which it has been defined in s. 1 of Beng. Act VII of 1868 That definition runs as follows: The word 'estate' means any land, or share in land subject to the payment to Government of an annual sum in respect of which the name of a proprietor is entered on the register, known as the general register, of all revenue paying-estates, or in respect of which a separate account may, in pursuance of s. 10 or s. 11 of the said Act XI of 1859, have been opened.' That shows that there are the following elements in an estate: (1) land or share in land; (2) annual sum payable to Government; (3) name of the proprietor as entered in the general register of revenue-paying estates. It is not the land which is the estate. It is not the annual jumma. It is not the name of the recorded proprietor But it is the combination of all three, which go to form the conception of an estate as used in s. 6 of Act XI of 1859 Even when Beng. Act VII of 1868 was not in force, there is ample evidence in Act XI itself to show that that was the meaning of an estate. There can be no doubt that the words 'estate' and 'share of an estate' have been used in s. 6 in the same sense in which they have been used in s. 28 of the said Act; that section refers to schedule A, which gives the form of the certificate. The said schedule, therefore, must be taken to be part of s. 28. That form shows what an estate is. It says 'the mehal specified below,' and what is the specification that it gives: '*Towzi number, name of mehal, name of the former proprietor, sudder jumma.*' All these four elements constitute the estate. That it should be so will also be clear from a consideration of the very nature of the thing. Let us suppose that A and B hold an estate, each having an 8-anna share. B opens a separate account. It has to be recollected that under the provisions of s. 13, Act XI of 1859, notwithstanding the opening of separate accounts, the separate shares continue to constitute one integral estate. It is, therefore, that the Board of Revenue points out by their rule, which appears at page 158 of the Collection of Board's Rules of 1878, Vol. I., 'that the separation of shares of an estate held in common or consisting of specific portions of land by the opening of a separate account under ss. 10 and 11, Act XI of 1859, causes no alteration of the revenue roll.' Thus when B has caused a separate account to be opened with respect to his 8-anna share both A and B will have the same number, the same name of the property and the same sudder jumma in the 8-anna share of each. Those elements could not indicate whose estate it is. The name A or B is the only distinctive

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feature. I hold, therefore, that the notification under s. 6 of Act XI would be defective without the name of the recorded proprietor, but in the case now under consideration, if the statement of the plaintiffs is true, the notification was not only defective, but misleading. Here the name of the recorded proprietor was not admitted, but the name of a wrong man, who had no existence, was shown. Now the arrear due was Rs. 5-8 only; the property is worth at least Rs. 1,350. There is no suggestion that the property has been purchased for some one of the several co-sharers. The presumption under the circumstances is, that Peari Mohun Mookerjee, or any one of the other sharers who had paid their share of the revenue, had not come to know that the sale notification had been issued. When it has not been alleged that the plaintiffs were aware of the issue of the sale notification, it is the more necessary to examine very critically whether everything required by law was duly done. Section 8 of Beng. Act VII of 1868 precludes us from inquiring whether the most effective mode of proclamation, *viz.*, that directed to be made at the Cutcherry of the defaulter was made or not, but it is quite open to us to inquire whether the notification under s. 6 of Act XI was properly made or not. It is contended by the pleader for the purchaser that there is nothing on the record, to show what the notification was. Now the certificate granted is presumptive evidence of the contents of the notification so far as the description of the estate is concerned, nevertheless as the case must go before the first Court, and as the first Court decided the case without entering into the evidence, the point may be definitely settled. I remand the case under s. 566 of the Civil Procedure Code, for a finding on each of the following issues. *First*: 'did the notification under s. 6, Act XI of 1859, issued with respect to the property in dispute, correctly describe the name of the proprietor as it then stood in the register known as the general register of all revenue-paying estates.' If that issue is found in favour of the plaintiffs then, *secondly*, have the plaintiffs sustained substantial injury in consequence of such irregularity."

On the first of the above issues, it was found that at the time the notification of sale was issued, the recorded proprietors were Talebulla and eight others, and that the name of Talebulla alone appeared in the notification of sale; but the Judge of the Court of first instance held that it was not proved "that owing to the omission in inserting the names of all the proprietors, the estate was sold for an inadequate price." On appeal the District Judge held that there being the defective notification and the substantial injury he was justified in assuming that the injury was caused by the defective notification, there being no evidence to show it could be caused by anything else—*Gopee Nauth Dobey* v. *Roy*

Luchmeeput Singh Bahadur (1). The learned Judge then reversed the judgment of the Court below, and set aside the sale. The Secretary of State and the purchaser appealed to the High Court on the ground "that the Appellate Court clearly misunderstood the meaning of s. 6, Act XI of 1859, by holding that the sale notification was bad for not containing the names of all the recorded proprietors in it."

Baboo *Unnoda Persad Banerjee* and Baboo *Mohesh Chunder Chowdhry* for the appellant.

Baboo *Rash Behary Ghose*, Baboo *Bipro Dass Mookerjee* and Baboo *Pran Nauth Pundit* for the respondents.

The judgment of the Court (MITTER, J. Offg. C.J., and MACLEAN J.), was delivered by

MITTER, J.—This is a suit to set aside a revenue sale of the share of an estate called Aima Mungulpore bearing Towzi No. 1312.

The ground upon which the lower Appellate Court has set aside the sale is that the sale notification under s. 6, Act XI of 1859, did not contain the names of all the recorded proprietors of this share, but only of one of them, Talebulla. Section 6 requires that a notification should be issued in the language of the district specifying the estates or shares of estates which are to be sold. The District Judge is of opinion that unless the names of all the recorded proprietors are given, an estate, or share of an estate, cannot be considered to be specified within the meaning of s. 6. We are unable to agree in this view of the law. The section distinctly says that it is the estate or the share of an estate which is to be specified. If it were the intention of the Legislature that the names of the recorded proprietors should be also inserted, the section would have contained a provision to that effect in distinct words.

In this case it is not shown that the share of the estate which was sold was not properly specified. All that has been established in the lower Court is that instead of the names of all the recorded proprietors being mentioned in the sale notification, the name of only one of them, namely Talebulla, was inserted. As the

(1) I L. R., 3 Calc., 542.

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section in question does not require the names of the recorded proprietors to be mentioned in the notification, the mistake of not inserting the names of all the recorded proprietors is not an irregularity within the meaning of that section.

We therefore reverse the decree of the lower Appellate Court and dismiss the plaintiff's suit with costs.

In Appeal No. 865, the purchaser is the appellant. We are of opinion that the purchaser might have joined the Government in prefering an appeal. We therefore direct that the plaintiffs will pay to the defendants, namely, the Secretary of State for India and the purchaser Purnu Chunder Singh, only one set of costs throughout the litigation.

Appeal allowed.

FULL BENCH REFERENCE.

Before Sir Richard Garth, Knight, Chief Justice, Mr. Justice Mitter, Mr. Justice McDonell, Mr. Justice Prinsep and Mr. Justice Wilson.

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TULSI PANDAY (DEFENDANT) *v.* BUCHU LALL (PLAINTIFF).*

Bengal Act VIII of 1869, *s.* 102—*Practice—Appeal—Second Appeal.*

In a suit for arrears of rent and ejectment the right of appeal is taken away by s. 102, Beng. Act VIII of 1869, only when it is shown that the amount sued for and the value of the property claimed is less than Rs 100. Unless that fact appears, either from the finding of the District Judge or elsewhere upon the proceedings, the High Court has no right to draw any inference to that effect.

THIS was a suit for arrears of rent amounting to Rs. 16-1-3, and for ejectment. The defence was, amongst other things, that the defendant held more lands than the plaintiff admitted in his plaint; that the annual jumma of the defendant's land was Rs. 5-1 of which the plaintiff's share was Rs. 2-8-6; that the defendant had paid to the plaintiff the rent of 1284 F. S.; and that he had deposited in Court the rent for the years 1285 F. S. and 1286 F. S. The Court of first instance gave the plaintiff a decree. On appeal the defendant urged that the plaintiff, being a cosharer, was not entitled to eject the defendant. The District Judge overruled the objections and dismissed the appeal. The defendant ap-

*Full Bench Reference made by Mr. Justice Mitter, Offg. Chief Justice, and Mr. Justice Norris, dated the 4th August 1882, in appeal from Appellate Decree No 586 of 1882.

pealed on the ground "that the plaintiff being only a part owner of the lands in suit, his prayer for ejectment under section 52 of the Rent Act should have been rejected."

The case came before MITTER, J., (Offg. C.J.) and NORRIS, J., by whom it was referred to a Full Bench with the following remarks :—

MITTER, J.—This appeal arises out of a suit which was brought for the recovery of arrears of rent, and for ejectment of the defendant, appellant. It is admitted that the plaintiff is the owner of a fractional share of the estate within which the defendant's tenure is situated; it is also admitted that the plaintiff is entitled to maintain a separate suit for the rent of his share. One of the questions raised in the defence was, that the plaintiff being the owner only of a fractional share of the estate in which the defendant's tenure is situated, is not entitled to a decree for ejectment under s. 52 of the Rent Act. The lower Courts are of opinion that the plaintiff is entitled to a decree for ejectment.

We cannot agree with the lower Courts in this view of the law. The point in question has been set at rest by authority, and we will only refer to the last case on the subject—*Reasut Hossein* v. *Chorwar Singh* (1). The same view of the law was taken in another decision—*Alum Manjee* v. *Ashad Ali* (2). We are therefore clearly of opinion that the decree for ejectment passed in this case cannot be sustained.

But the learned pleader for the respondent has taken a preliminary objection to the hearing of this appeal. The objection is based on the provisions of s. 102 of Beng. Act VIII of 1869. That section says: "Nothing in this Act contained shall be deemed to confer any power of appeal in any suit tried and decided by a District Judge originally or in appeal, if the amount sued for, or the value of the property claimed, does not exceed one hundred rupees." In this case the rent claimed was Rs. 16-1-3, but it does not appear what was the value of the defendant's interest in the land from which it was sought to eject him.

In our opinion, unless it can be shown that the value of that interest and also the amount of rent sued for do not exceed

(1) I. L. R., 7 Calc., 470. (2) 16 W. R., 128.

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Rs. 100, the right of second appeal is not taken away under that section; but this view of the law is in conflict with a decision of this Court in *Parbutty Churn Sen* v. *Shaik Mondari* (1). We therefore refer the following question to the decision of a Full Bench, whether, under the circumstances stated above, a second appeal lies to this Court?

Baboo *Bussunto Coomar Bose* for the appellant.

Baboo *Jogesh Chunder Roy* for the respondent.

The judgment of the Full Bench on the point referred was delivered by

GARTH, C.J.—It seems to us that the view taken by the learned Judges who referred this case is correct. *Primâ facie* in a suit of this kind the appellant is entitled to a second appeal. The question is, whether that right is taken away by s. 102 of Beng. Act VIII of 1869? That section only applies where the amount sued for, or the value of the property claimed, does not exceed Rs. 100.

In this case there is nothing to show that the value of the property claimed does not exceed Rs. 100; and unless that fact does appear, either from the finding of the lower Court, or elsewhere upon the proceedings, it seems to us that we have no right, (more especially as we are only empowered here to deal with points of law) to draw any inference to that effect.

We are, therefore, of opinion, that this Court has jurisdiction to entertain the appeal; and as the Division Bench has already decided that the lower Courts were wrong in decreeing the ejectment, we think that the judgment should be modified accordingly, and that the defendant should be allowed his costs of appeal in all the Courts, so far as they relate to that point.

Appeal allowed.

(1) I. L. R., 5 Calc., 594.

APPELLATE CIVIL.

Before Mr. Justice Maclean and Mr. Justice O'Kinealy.

1883
January 4.

IN THE MATTER OF THE PETITION OF IMAM BUKSH.

IMAM BUKSH *v.* THACKO BIBEE.*

Mahomedan Law—Minor—Guardian of property—Certificate of Guardianship.

Under the Mahomedan law the brother of the mother of a female minor, whose parents are dead, is entitled, in preference to a mere stranger, to the guardianship of the property of the minor, unless it be shown that he is in some way unfit to take charge of such property.

THE facts of this case are thus stated in the judgment appealed from: "According to the evidence, and to the undisputed statement of the several parties, the minor, her father and mother having predeceased her, became the grantee under a *heba*, or deed of gift, from Nizamudin, her paternal grandfather, of a certain estate. On the death of that paternal grandfather, the applicant Imam Buksh came to Court under Act XL of 1858 for a certificate to administer the minor's estate. This application is opposed by the widow of Nizamudin, the co-wife of the minor's paternal grandmother. She, Thacko Bibee, repudiates the alleged hibbanamah, and claims to be herself sole heir to the estate of Nizamudin, to the exclusion of the minor, on the ground that the latter is excluded by the fact that her father, who would otherwise have been one of Nizamudin's heirs, predeceased him. The applicant Imam Buksh proposes that the female guardian of the minor's person shall be his wife. The Collector interposes, and objects to the application of Imam Buksh on the ground that he, being in the direct succession to the minor, is not a fit person to administer her estate, or to have charge through his wife, of her person, and the Collector has recommended a third person, a respectable Mahomedan lady, as both administratrix and guardian." The District Judge then appointed the lady recommended by the Collector, and dismissed the application of Imam Buksh. The latter appealed to the High

* Appeal from Original Order No. 216 of 1882, against the order of J. P. Grant, Esq., Judge of the 24-Pergunnahs, dated the 12th May 1882.

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Court, on the ground that the learned Judge was wrong in giving the guardianship of the person and property of the minor to a stranger as against Imam Buksh a near relative.

Mr. *Twidale* and Moonshee *Serajul Islam* for the appellant.

Baboo *Unnoda Prosad Banerjee* and Baboo *Amarendro Nath Chatterjee* for the respondents.

The judgment of the Court (MACLEAN and O'KINEALY, JJ.) was delivered by

MACLEAN, J.—The appellant before us applied to the district Court of the 24-Pergunnahs for a certificate of administration, under Act XL of 1858, to the property of an infant, Chota Bari Bibee, granddaughter of one Nizamudin. The petitioner's position is that of a brother of the infant's deceased mother.

There appears to be some opposition on the part of one Thacko Bibee, widow of Nizamudin; but her case does not affect the question before us. She disputes the title of the infant to the property of Nizamudin. That question, of course, has to be decided elsewhere.

The Collector, we are informed, was the first who moved the Civil Court to appoint a guardian for the minor, and he also appears to have suggested to the Judge the appointment of a lady called Kulsoom Bibee, who is in no way connected with the minor by any relationship. The District Judge, adopting certain objections made by the Collector to the appointment of the appellant, has refused him a certificate, and granted one to the Collector's nominee, Kulsoom Bibee. Hence this appeal.

The law in this matter is perfectly clear, that is, if any person establishes a right by virtue of a will or deed to take charge of the property of a minor, that person shall have a certificate of administration. There being no person so entitled, or any person so entitled being unwilling to undertake the trust, it is in the discretion of the Court to entrust any near relative of the minor, who is willing to take up the trust, with the charge of the property. Failing the person who is entitled to a certificate, and failing any near relative who is willing and fit to undertake the trust, the Court may make other

provisions. Therefore the only question we have to consider is, has it been shown that Imam Buksh, who is undoubtedly a near relative, is unfit to take charge of the property of the minor. The only ground of unfitness suggested is that he is in the direct succession to the minor. That is an objection which, of course, might apply in other cases, such as to a father who claims the custody or charge of the property of a son or daughter. That is not, in our opinion a sufficient ground for refusing a certificate to the charge of the property. In fact, there may be cases in which some one interested in the succession is the very best person to defend the minor's interests. However, in the present case, we think that the alleged disqualification imputed to Imam Buksh is not sufficient to deprive him of the certificate he asks for. We have no doubt that the lady named by the Collector is in every way suitable, but we do not think that her claim should have precedence over that of the minor's mother's brother. We therefore direct that the certificates issued to Kulsoom Bibee be re-called, and a fresh certificate of administration issued to Imam Buksh.

With reference to the guardianship of the minor's person and maintenance, it is not necessary for us to make any order here, as we are not in a position to state who should be the proper guardian of her person. We direct the District Judge to make the necessary orders.

The appellant is entitled to his costs, which he will recover from the Collector and Kulsoom Bibee.

Appeal allowed.

BENGAL SECRETARIAT LIBRARY.

Before Mr. Justice McDonell and Mr. Justice Tottenham.

1883 *February* 16.

SERU MOHUN BANIA (DEFENDANT) *v.* BHAGOBAN DIN PANDEY (PLAINTIFF.)*

Suit to obtain possession of land sold in execution of a decree—Possession Application for by auction-purchaser—Execution proceedings—Subsequent suit for possession of land sold in execution of decree.

In execution of a decree certain land belonging to the judgment-debtor was sold; subsequently the auction-purchaser, who had not got possession, resold the land to a third party and gave him the certificate. The latter then applied to the Court to be put into possession, but having failed in those proceedings, owing to some irregularity in the description of the boundaries of the property, he instituted a regular suit against the judgment-debtor to obtain possession. On a plea that such suit would not lie as the plaintiff could have got possession in the miscellaneous proceedings,

Held, that having regard to the provisions of Art 138, of Sch. II, of Act XV of 1877 and of s. 11 of Act XIV of 1882 such suit was maintainable.

THIS was a suit brought to obtain possession of one powa of land with some thatched huts on it. The plaintiff stated in his plaint that the land in question had previously belonged to the defendant, but that it had been sold, on the 21st December 1878, in execution of a decree passed against him in the Sudder Munsiff's Court, and purchased at such sale by one Etbar Miyah, who subsequently duly obtained a certificate. Etbar Miyah subsequently sold the land and huts to the plaintiff under a kobala, dated the 5th July 1879, and the plaintiff thereupon filed a petition for the purpose of getting possession of the land from the defendant. In the proceedings held in consequence of that petition the plaintiff failed to get possession, and he now stated that the reason why he had so failed was that the peon could not put him in possession owing to the boundaries given in the purwana not corresponding with the actual boundaries of the land in question; consequently the defendant having opposed him in taking possession he brought this suit to compel him to give up the land.

* Appeal from Appellate Decree No. 141 of 1882, against the decree of Captain M. A. Boyd, Deputy Commissioner of Cachar, dated the 9th November 1881, affirming the decree of Baboo Jugut Bundhoo Nag, Extra Assistant Commissioner of Silchar, dated the 14th January 1881.

The defendant in his written statement pleaded that in the miscellaneous proceedings held upon the plaintiff's petition Etbar Miyah's purchase had been held to be irregular, and that the plaintiff's petition had been rejected on the ground that he could not obtain possession by virtue of that purchase; that the plaintiff had every means of obtaining possession in those proceedings; and that therefore the present suit would not lie. He also denied that the land now sought to be recovered was identical with that sold at the execution sale.

The first Court found that the land was the same as that referred to in the sale certificate, and that the suit would lie, and consequently gave the plaintiff a decree, and this was confirmed on appeal by the lower Appellate Court.

In that Court the defendant contended that the suit was barred under Art. 13, Sch. II, Act XV of 1877, and that the only remedy open to an auction-purchaser or his representative, which the plaintiff in this case was, was that provided by s. 318 of the Civil Procedure Code. The defendant now preferred a special appeal to the High Court.

Baboo *Joy Gobind Shome* for the appellant.

Baboo *Surrendro Nath Matilal* for the respondent.

The judgment of the Court (McDONELL and TOTTENHAM, JJ.) was delivered by

McDONELL, J.—We fail to see any error of law in the decision of the lower Appellate Court. It has been distinctly found that the land now claimed was without doubt the land referred to in the sale certificate. The only point raised before us in second appeal, which requires consideration, is whether the suit is maintainable; but reading Art. 138 of the second schedule of the Limitation Act with s. 11 of the Civil Procedure Code, we hold that there is no reason why the present suit should not be maintained. The appeal is dismissed with costs.

Appeal dismissed.

ORIGINAL CIVIL.

1883
February 20.

Before Mr. Justice Norris.

THE ORIENTAL BANK CORPORATION AND OTHERS *v.* GOBIND LALL SEAL AND OTHERS.

Practice—Leave to sue—Suit by one creditor on behalf of others—Civil Procedure Code (Act X of 1877), s. 30.

A suit by one or more creditors on behalf of other creditors cannot be entertained without the leave of the Court being obtained for its institution. Such leave cannot be granted at the hearing.

THIS was a suit instituted by the Oriental Bank Corporation and the Delhi and London Bank "on behalf of themselves and all other the unsatisfied creditors of one Heera Lall Seal, deceased," for the construction of a certain indenture of settlement dated the 21st February 1848, by which one Mutty Lall Seal, the father of Heera Lall Seal, purported to settle certain property in trust for the members of his family, and for a declaration that Heera Lall Seal, who died intestate on the 17th March 1876, was at the time of his death entitled to a one-fifth share in the property comprised therein, and that his representatives were at the time of the institution of the present suit entitled to such property. On the 15th of May 1876 a suit was instituted for the administration of Heera Lall Seal's estate A decree for an account was made, and on the account being taken it appeared that there were not assets sufficient to enable all the creditors to be paid in full. The present suit was made supplemental to the administration suit. No leave had been granted by the Court at the institution of the suit to the plaintiff Banks to sue on behalf of the other creditors.

The defendant Gobind Lall Seal in his written statement pleaded that no leave to sue had been granted.

Mr. *Pugh*, Mr. *Hill*, Mr. *Banerjee*, Mr. *Allen* and Mr. *Stokes* for the plaintiffs.

Mr. *Pali* and Mr. *Sale* for the defendant Gobind Lall Seal.

The *Advocate-General* (Mr. *G. C. Paul*) Mr. *Kennedy*, Mr. *Branson*, Mr. *Phillips*, Mr. *Evans*, Mr. *T. A. Apcar*, Mr. *Gasper*,

Mr *Trevelyan*, Mr *Stephen*, and Mr *O'Kinealy* for other defendants

Mr *Palit* took the preliminary objection that the suit could not proceed as no leave to sue had been granted under s 30 of Act X of 1877 He contended that such a suit as the present one was analogous to a suit under the Religious Endowments Act XX of 1863 under which it had been held that the leave of the Court was necessary in order to the institution of a suit regarding endowed property by some of the persons interested in it—*Dhurum Singh* v *Kissen Singh* (1), *Jan Ali* v *Ram Nath Mundul* (2) He also referred to *Powell* v *Wright* (3)

Mr *Pugh* for the plaintiffs contended that the cases under the Religious Endowment Act could not apply to a creditor's suit, that the word "parties" in s 30 meant not persons in the position of creditors, but persons without whose presence on the record the suit would be defective, Story on Eq Pleading, p 107, and that leave could be given *nunc pro tunc*

NORRIS, J —The facts of this case are shortly as follows One Heera Lall Seal died intestate on 17th March 1876, and his estate is now being administered by the Court The accounts taken in the administration suit do not disclose assets sufficient to pay all the creditors in full, and this suit has been brought by the plaintiff Banks, in the nature of a supplemental suit to the original administration suit, with the view of obtaining a declaration that Heera Lall Seal was at the date of his death entitled to a one fifth share in the property comprised in a certain Indenture of Settlement made by his father Mutty Lall Seal, and dated 21st February 1848, and that his (Heera Lall s) representatives in estate are now, as such and subject to the liquidation of Heera Lall's debts, entitled to the said one-fifth share, thus seeking to make available a very considerable estate for distribution amongst the general body of creditors

The suit purports to be brought by the plaintiffs on behalf of themselves and all other the unsatisfied creditors of Heera Lall Seal, deceased "

(1) I L R, 7 Calc 767 (2) I L R 8 Calc 32 (3) 7 Beav, 444.

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It is contended by Mr. Palit, who appears for the first defendant, that the suit cannot be entertained, inasmuch as the provisions of s. 30 of the Civil Procedure Code have not been complied with.

That section reads thus: "Where there are numerous parties having the same interest in one suit, one or more of such parties may, *with the permission of the Court*, sue or be sued, or may defend in such suit, on behalf of all parties so interested, but the Court shall in such case give, at the plaintiff's expense, notice of the institution of such suit to all such parties either by personal service or (if from the number of parties or any other cause such service is not reasonably practicable) then by public advertisement, as the Court in each case may direct."

Mr. Pugh for the plaintiffs admits that no such permission has been obtained, and argues that it was unnecessary. "Parties," says Mr. Pugh, "does not mean persons in the position of creditors, but means only parties necessary to the suit, without whose presence on the record the suit would be defective."

I am unable to put so limited a construction upon the word "parties." I think it means "persons." It appears to me that the provisions of the section would be unintelligible unless the word received that meaning.

The section appears to be taken from Rule 9, Order XVI of the rules and orders made under the provisions of the Supreme Court of Judicature Act, 1875. That rule says: "Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued, or may be authorised by the Court to defend in such action, on behalf or for the benefit of all parties so interested." The result of this rule was to give legislative sanction to the practice which had long obtained in the Court of Chancery; but there is this distinction between the rule and s. 30: the former contains no provision requiring the permission of the Court, nor any provision as to notice. The provision requiring the authority of the Court for such proceedings, and the clause "but the Court shall give, &c.," to "may direct" are important amendments and certainly necessary in this country, without them many a man

might be concluded by a suit of which he never may have heard. (Broughton's Civil Procedure Code, 133.)

Mr. Palit in support of his argument referred to the case of *Jan Ali* v. *Ram Nath Mundul* (1) decided by an Appellate Bench of this Court, and though I am not prepared to say that I should consider every judgment of an Appellate Bench binding upon me when sitting on the Original Side, yet every such judgment should receive respectful consideration and careful attention, and should be followed unless I am very clearly of opinion that the conclusion arrived at is an erroneous one.

In that case a deed of *wuqf* had been executed making an endowment of certain land, the profits whereof were to be appropriated to the maintenance of a mosque. The defendant No. 1 was appointed *Mutawalli* under the deed of *wuqf*; he borrowed Rs. 575 from defendant No. 2, giving, by way of security, a mortgage of part of the endowed property; he subsequently borrowed Rs. 650 from defendant No. 3, and concluded an ijara settlement with him; defendant No. 2 brought a suit upon the mortgage bond, obtained a decree, took out execution, and brought to sale the endowed property comprised in the mortgage which defendant No 3 purchased. The plaintiffs, who were followers of the Mussulman religion living in the village where the mosque was situated, alleging a right and interest in protecting the musjid, filed a plaint asking for declarations that the property mortgaged to defendant No. 2 was *wuqf* property; that the auction-purchase thereof made by defendant No. 3 and the ijara and mortgage were invalid; and that another *mutawalli* might be appointed. Prinsep, J., after dealing with various points, which it is not necessary here to notice, says at page 40: "We now come to deal with the other prayers in the plaint, which do not fall within the provisions of s. 14 of the Religious Endowments Act. These prayers are that the property mentioned in the schedule to the plaint may be declared to be *wuqf*; that the mortgage and the ijara and the sale under the mortgage may be set aside; and that a competent person may be appointed by the Court as *mutawalli*. Now, so far as regards these prayers we think that the plaintiffs were not authorized to institute this suit by reason of their having an interest created

(1) I. L. R., 8 Calc., 32.

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by their being followers of the Moslem religion, and living in the vicinity of the mosque, and being in the habit of attending the musjid. That interest is common to them with all the Mahodan residents in the vicinity, and we think that this is a case which falls within the provisions of s. 30 of the Code of Civil Procedure. It may be quite possible that if these plaintiffs had applied to the Court under the provisions of s. 30, they would have obtained permission to institute this suit, but not having obtained that permission, they certainly were not entitled to institute this suit."

I cannot see any distinction between the position of the plaintiffs in that case and that of the plaintiffs in this suit. "The other unsatisfied creditors of Heeralal deceased" appear to me to correspond with "all the Mahomedan residents in the vicinity" mentioned by Prinsep, J.

I am therefore of opinion that Mr. Palit's objection is a valid one, and that the suit cannot proceed.

I have now to consider what I ought to do—whether to dismiss the suit or to yield to Mr. Pugh's application to grant permission for its institution *nunc pro tunc*, and to adjourn the hearing until the requisite notices have been given. I am anxious not to dismiss the suit after so much expense has been incurred, but I do not think I have the power to grant permission at this stage. I would do so if I thought I had the power. I must therefore dismiss the suit with costs, to be based on scale No. 2. Mr. Pugh applies for leave to bring a fresh suit on the same subject-matter which I readily grant.

Suit dismissed.

Attorneys for the plaintiffs: Messrs. *Barrow* and *Orr*.

Attorneys for the defendants: Baboo *Nobin Chund Bural* Mr. *Carruthers*, Mr. *Hart*, Mr. *Gillanders*, Messrs. *Beeby & Rutter*, and Mr. *Pittar*.

APPELLATE CIVIL.

1882
December 14

Before Mr Justice Wilson and Mr Justice Field.

NOYNA MISSER AND ANOTHER (PLAINTIFFS) *v* RUPIKUN AND OTHERS (DEFENDANTS)*

Landlord and Tenant—Cultivation—Changing character of lands—Forfeiture—Mandatory injunction

Where a tenant has been guilty of a breach of duty in the use of his land, such as making a tank in it building on it improperly, or changing the character of the cultivation, such conduct does not necessarily operate as a forfeiture so as to render the tenant liable to ejectment

The tenant of an agricultural holding planted his jote with mango trees to the knowledge, but without the consent, of his landlord, thus changing the character of the land More than three years afterwards the landlord sued for a mandatory injunction to have the mango trees removed

Held, that having stood by for more than three years and allowed the tenant to spend his labour and capital upon the land without taking any action in the matter, the landlord was not entitled to a mandatory injunction

THIS was an action for a mandatory injunction and for ejectment. The plaintiffs stated that in 1281 F. S (1874-1875) they let to the defendants certain land for the purpose of tillage and cultivation of crops, that the defendants, without the permission of the plaintiffs, enclosed the land and planted mango grafts thereon; "that the planting of the grafts has altered the nature of the land, and in future when the grafts will be fully grown and shady, the lands in the vicinity surrounding will suffer loss in their produce, and the plaintiffs will sustain injury." They then prayed for a mandatory injunction to have the trees uprooted and for possession of the land. The defendants denied that they had been served with any notice to quit—*Rajendronath Mukhopadhya* v. *Bassudev Ruhman Khoudkhar* (1), they alleged that the garden had

* Appeal from Appellate Decree No 2234 of 1881, against the decree of Baboo Koylash Chunder Mukerjee, Second Subordinate Judge of Tirhoot, dated the 20th June 1881, reversing the decree of Syed Abdul Karim, Munsiff of Durbhunga, dated the 2nd October 1879

(1) I L R, 2 Calc, 146

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been planted more than twelve years previous to the institution of the suit; and they also insisted that any relief based on the footing of breach of contract was barred by the three years rule of limitation.

The Court of first instance decreed the plaintiffs' claim in full, citing *Lal Sahoo* v. *Deo Narain Singh* (1). On appeal the Subordinate Judge disallowed the prayer for ejectment on the ground that no notice to quit had been given. He found that the mango trees had, to the knowledge of the plaintiffs, but without their consent, been planted more than three years before the institution of the suit; and he held that the plaintiffs' claim was barred by limitation, under the provisions of s. 27, Beng. Act VIII of 1869—*Kali Kamul Mazumdar* v. *Shib Sahai Sukul* (2); *Mahi Sahu* v. *Forbes* (3). He, therefore, reversed the decision of the Munsiff and dismissed the plaintiffs' suit with costs.

The plaintiffs appealed to the High Court on the grounds that: (1) no notice to quit was required; (2) that s. 27 of Beng. Act VIII of 1869 did not apply to the case; (3) that at any rate the injunction should have been granted.

Baboo *Aubinash Chunder Banerjee* for the appellants.

Baboo *Saligram Singh* for the respondents.

The judgment of the Court (WILSON and FIELD, JJ.) was delivered by

WILSON, J.—We think that this appeal should be dismissed. Two points have been discussed before us: First, whether the Judge in the lower Appellate Court was right or not in overruling so much of the decree of the Court of first instance as granted to the plaintiffs a decree evicting the defendants. As to that we feel no hesitation; no authority has been cited to us, nor any reasoning satisfactory to our minds tending to show that where a tenant has been guilty of a breach of duty in the use of his land, such as making a tank in it, building on it improperly, or changing the character of the cultivation, this operates necessarily as a forfeiture and renders him liable to be evicted. On this point, therefore, we

(1) I. L. R., 3 Calc., 781.

(2) 3 B. L. R. ap 47: 11 W. R., 452

(3) B. L. R. Sup. Vol. 500. 6 W. R, Act X Rul., 61.

fully agree with the lower Appellate Court. The second question is one of much greater difficulty, and that is whether the lower defendants, ought not at the same time to have given them a decree granting an injunction against the future use of the land by the defendants in the way objected to by the plaintiffs. Now it appears to us quite clear that the learned pleader for the plaintiffs (appellants) has established the proposition that what was done by the defendants was a wrong for which a remedy is to be found in law. A tenant has not the right to alter the character of the land which he holds in such a way as to permanently injure the interest of the landlord in that land; and on the finding in this case it must be taken that the tenants, the defendants in this case, have done so. A suit for damages would, therefore, undoubtedly lie, but this is not what is asked for in this case. What is asked for is an injunction to compel the defendants to uproot the trees they have planted upon the land. Now, a remedy by injunction is no doubt a useful, but it is at the same time a very strong remedy, and one not ordinarily granted where any other remedy is fairly open to the applicant, or where the conduct of the parties has been such as to make it a harsh remedy to give in a particular case. The Legislature have expressed their view upon the matter in s. 56 of the Specific Relief Act, which is one of those dealing specifically with injunctions, and among the conditions there laid down it is enacted that an injunction cannot be granted when equally "efficacious relief can certainly be obtained by any other usual mode of proceeding," and "when the conduct of the applicant or his agents has been such as to disentitle him to the assistance of the Court." Now, one way in which an applicant may disentitle himself to the assistance of the Court, is if he has stood by for a considerable time and allowed the person, against whom he applies, to go on with his work, and lay out his money and labour upon the land without any objection, and only applies to the Court after allowing all this to go on for some time. We think it has been sufficiently found that that is what has taken place here. The plaintiffs allege in their plaint that the cause of action arose in Kartick 1286, when the plaintiffs were informed that the land had been used as complained of by the defendants. An issue was framed upon this point, the second

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Appellate Court, while reversing so much of the decree of the Court of first instance as declared the plaintiffs' title to evict the issue on the merits, *viz.*, "whether or not the plaintiffs had knowledge and cognizance of the planting of the grafts when they were so planted." Now what the lower Appellate Court has found is this: the Subordinate Judge says, first:—

"The Munsiff, believing the plaintiffs and his putwary, has held that the mango trees were planted in 1285 and 1286 Fusli but I do not believe them. The Munsiff has made a local enquiry and has himself found that the disputed trees are from 4½ cubits to 6 cubits in height, and I think that according to the natural law they must have been planted more than three years before the suit, if not before;" and he says: "I cannot agree with the Munsiff in thinking that they were planted in 1285 and 1286;" and later on he says: "The plaintiffs state that their cause of action arose in Kartick 1286 Fusli, when they became aware of the wrongful acts of the defendants, but I do not believe that story, and it was obviously made to avoid limitation. It is contended that the uprooting of the trees may be done legally, although the prayer of ejectment be not granted; but I think that when the plaintiffs and their putwary acquiesced in the defendants' planting the trees and allowed their claim of ejectment to be barred, they should not be now allowed to have the trees uprooted. I do not believe, however, that the trees were planted with the zemindar's consent." This appears to us to amount to a finding that the plaintiffs, at the time when the trees were planted, were aware of the fact, and that they stood by for more than three years—how much more does not appear—and allowed the defendants to spend their labour and capital upon the land without taking any action in the matter. That appears to us to be a sufficient reason why no injunction should issue in the case. These are the only two points discussed before us. There is no claim for damages in the suit. For these reasons this appeal must be dismissed with costs.

Appeal dismissed.

ORIGINAL CIVIL.

Before Mr. Justice Norris.

RAMNARAIN KALLIA *v.* MONEE BIBEE AND OTHERS;

AND

RAMNARAIN KALLIA *v.* GOPAL DOSS SING.

1883
February 2.

Evidence Act (I of 1872), s. 32, cl. 6—Horoscope.

In a suit to recover possession of immovable property, the plaintiff tendered in evidence a horoscope which he said had been given to him by his mother and had been seen by members of his family and used on the occasion of his marriage. He was unable to say by whom the horoscope, or an endorsement on it, which purported to state what his name was, had been written. *Held*, that the horoscope was not admissible under s. 32, cl. 6 of the Evidence Act.

THESE two suits were instituted by the plaintiff to recover possession of certain immovable property. The defence was, that the plaintiff was illegitimate. At the hearing the plaintiff tendered in evidence a horoscope. He stated that the horoscope had been given to him by his mother, Sibsoondery Dassee; that it had been used at the time of his marriage; and that it had been seen by certain members of his family. He was unable to say by whom the horoscope, or by whom an endorsement on it, which purported to state what his name was, had been written.

Mr. *Kennedy* (for the plaintiff).—The horoscope was brought to the notice of the family, and acted on at the time of the plaintiff's marriage. This comes within the class of cases, where entries in family bibles, and so forth, are admitted in evidence in questions of pedigree, Evidence Act, s. 32, cl. 6. The statement is that he is the legitimate son of Sibsoondery. [NORRIS, J.—There is no evidence to show by whose instructions the horoscope was prepared; it might have been under the directions of the mother anxious to prove the legitimacy of her child]. So might an entry in a family bible. This document was seen by, and acted on by other members of the family, who had an interest in proving that the plaintiff was illegitimate, and it has come out of proper custody.

Mr. *Phillips* (for the defendants).—The document does not come within s. 32, cl. 6 of the Evidence Act. "Other thing" must be of

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the same kind, as a family pedigree, tombstone, or family portrait. It must be something which is palpable and open to all the world. This is not a document public to all the family. It is a private document. Entries in a family bible are open to all the family. The horoscope does not relate to family affairs. The documents which are admissible in questions of pedigree are admitted because of the security derived from the general knowledge of the family. The section is not intended to relieve a person who is alive from producing the best evidence.

NORRIS, J.—I am of opinion that this document it not admissible in evidence. It is tendered as being admissible under s. 32, cl. 6 of the Evidence Act. That sub-section makes a statement admissible when it "relates to the existence of any relationship by blood, marriage, or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait, or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised." The document tendered is not a statement relating "to the existence of any relationship by blood, marriage, or adoption, between persons deceased." It only purports on the face of it to be a statement of relationship between a deceased person and a living person. I do not think that s. 32 embraces such a case. It is not suggested that the document is a will or deed relating to the affairs of the family. It is tendered as a statement relating to the parentage of a person who is alive. Then it is said it is a statement in the nature of a family pedigree. But I am of opinion that it does not come within those words in the sub-section. But there is another objection to the admissibility of the document which is fatal. Section 32 says that "statements written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense, which, under the circumstances of the case, appears to the Court unreasonable," may be admitted in certain cases. On the plaintiff's evidence it appears that he does not know who wrote the horoscope, or the endorsement on it, and therefore cannot say whether the

writer "is dead, or cannot be found, or became incapable of giving evidence." I am therefore of opinion that the document is inadmissible."

Attorneys for the plaintiff: Messrs. *Remfry* and *Remfry*.
Attorney for the defendants: Mr. *E. O. Moses*.

APPELLATE CIVIL.

Before Mr. Justice Wilson and Mr. Justice Field.

MUTHURA PERSAD SINGH AND ANOTHER (PLAINTIFFS) *v.* LUGGUN KOOER AND OTHERS (DEFENDANTS). *

1883 *February* 16.

Interest—Penal clause in contract—Increased interest on default of payment—Contract Act IX of 1872, *s.* 74.

A mortgage bond contained a proviso that in case of default in payment of the principal sum, with interest at the rate of 1 per cent. per mensem on a certain day, interest should be paid at the rate of 2 per cent. per mensem from the date of the bond.

Held, that the stipulation to pay increased interest must be construed as a penal clause.

Baboo *Aubinash Chunder Banneryee* for the appellants.

Baboo *Huri Mohun Chuckerbutty* and Baboo *Pran Nath Pundit* for the respondents.

THE facts of this case sufficiently appear from the judgment of the Court (WILSON and FIELD, J.J.) which was delivered by

WILSON, J.—We think that the Subordinate Judge has decided this case rightly. He says: "I am of opinion that the stipulation made as to the payment of interest at the rate of Rs. 2 per cent. per mensem from the time of the execution of the bond, in case of default of repayment of the loan in time, was laid down in the deed as a check upon the debtor, and it should undoubtedly be held as a penal clause."

Several cases were cited to us in which full effect has been

* Appeal from Appellate Decree No. 2325 of 1881, against the decree of Baboo Ram Persad Roy, Subordinate Judge of Shahabad, dated the 21st September 1881, modifying the decree of Baboo Lall Gopal Sen, second Munsiff of Arrah, dated the 9th January 1880.

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given to an agreement, that if money is not paid at the due date it shall from that time bear an increased rate of interest—*Boolakee Lall* v. *Radha Singh* (1); *Mackintosh* v. *Wingrove* (2).

The former of these cases probably dealt with a document executed before the Contract Act; but however that may be such cases differ materially from the present. In them the agreement to pay an increased rate of interest from a future day may well be regarded as a substantive part of the contract, not as a penalty for its breach; but, where, as here, an increased rate of interest from the date of the bond is made payable on default, we cannot regard it in any other light than as a sum named in the contract to be paid in case of breach within the meaning of s. 74 of the Contract Act.

The appeal will be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Wilson and Mr. Justice Field

1882 *December* 19.

RAM DAS (PLAINTIFF) *v.* BIRJNUNDUN DAS *alias* LALOO BABOO AND ANOTHER (DEFENDANTS.)*

Limitation (Act IX of 1871) *Sch. II, Art.* 148—*Suit for redemption of mortgage—Acknowledgment of title of mortgagor or of his right to redeem.*

An acknowledgment to be within the meaning of Art. 148, Sch. II, Act IX of 1871, must be an acknowledgment of a present existing title in the mortgagor.

An acknowledgment of the original making of the mortgage deed and of possession having been taken under it, coupled with the allegation of the subsequent execution of two other deeds practically superseding the mortgage and altering the relation of the parties, contained in a written statement filed previous to the expiry of the 60 years allowed, is not a sufficient acknowledgment within the meaning of that Article, so as to prevent limitation from operating.

IN this suit the plaintiff sought to redeem a mortgage of immovable property which was executed on July 15th, 1815. The

* Appeal from Appellate Decree No. 181 of 1882, against the decree of Baboo Kali Prosunno Mookerjee, Subordinate Judge of Sarun, dated the 21st November 1881, affirming the decree of Baboo Dinesh Chunder Roy, Munsiff of Chupra, dated the 6th July 1880.

(1) 22 W. R., 223.

(2) I. L. R., 4 Calc., 137.

suit was instituted in December 18th, 1879, and the first Court dismissed the suit on the ground of limitation. That decree was confirmed on appeal by the lower Appellate Court, and the plaintiff now preferred a special appeal to the High Court. The plaintiff relied upon an acknowledgment made by the defendants in a written statement filed by them in a suit in the year 1872 as being sufficient to take the case out of the provisions of Art. 148, Sch. II of Act IX of 1871 (the Limitation Act), and the sole question argued was, whether that acknowledgment was sufficient to prevent the suit from being barred.

Baboo *Aubinash Chunder Banerjee* for the appellant.

Baboo *Taruck Nath Palit* for the respondents.

The judgment of the Court (WILSON and FIELD, JJ.) was delivered by

WILSON, J.—We entertain no doubt about this case, and we agree with the view taken by the Court below. The suit is a suit to redeem a mortgage, and the question is whether the suit is barred by limitation. There is no question that this depends upon the terms of the Limitation Act of 1871. Now, under Art. 148 of the second schedule to that Act, a suit must be brought within "sixty years from the date of the mortgage, unless where an acknowledgment of the title of the mortgagor or of his right of redemption has, before the expiration of the prescribed period, been made in writing, signed by the mortgagee, or some person claiming under him, and in such case, the date of the acknowledgment." In this case, the sixty years elapsed while the Act of 1871 was the governing Act, and the suit is therefore barred unless there is a sufficient acknowledgment to save it from the operation of limitation. The acknowledgment relied upon is contained in the written statement filed by the present defendants in August 1872, within sixty years from the making of the mortgage in the suit by the present plaintiff or those under whom he claims, and the acknowledgment runs in these words: "The land in dispute, according to the deed of zuripeshgi, dated 15th July 1815, for Rs. 425, executed by Ramrutton Das, devolved into the possession of Baboo Gokool Chund. Baboo Gokool Chund

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all along used to pay Rs. 2 as the right of the lessor. After the death of Ramrutton Das Gosain, Gopal Das, the *guddi nishin*, in consideration of Rs. 665 (including both) former and present (debts), executed a zuripeshgi deed, dated 21st October 1824, respecting the land under claim, as well as the garden named Khatri containing two beeghas of land, in favour of Baboo Gokool Chund an ancestor of the defendants. Subsequently he executed an ekrarnama, dated 11th August 1831, in lieu of the sum of Rs. 901 (by virtue of) which Baboo Gokool Chund till his lifetime was, and after his demise the defendants are, all along in possession of the same." Now that is an acknowledgment of the original making of the mortgage deed and of possession being taken under it, but the statement goes on to allege the execution subsequently of two other deeds, practically superseding the mortgage and altering the relation of the parties. Under the terms of Art. 148 we do not think that this is a sufficient acknowledgment to save the case from limitation. We think that "acknowledgment" in that Article means acknowledgment of a present existing title in the mortgagor.

We were referred to the decision in the case of *Daia Chand* v. *Sarfraz* (1) as an authority against this view of the case. The question there was, whether a certain record of right signed by the parties in question did or did not amount to an acknowledgment. The document was no doubt very scanty in its terms, and the case was relied on as showing that we ought to interpret the Act very liberally in deciding what constitutes an acknowledgment; but the difference between the two cases is clear. In that case, there was an acknowledgment of a title existing at the time of the acknowledgment, which is not the case in the appeal now under consideration. At page 122 in the judgment of Justices Turner and Oldfield it is said: "The terms of the law, an acknowledgment of the mortgagor's title, or an acknowledgment of his right to redeem, were not, it may be presumed, intended to be mere tautology. An acknowledgment that a certain person, or his representative, is the proprietor of the estate is an acknowledgment of his title. An acknowledgment that the mortgage is a

(1) I. L. R., 1 All., 117.

subsisting mortgage would be an acknowledgment of his right to redeem if he established his title." Those Judges, therefore, regard the acknowledgment required as an acknowledgment of an existing right to redeem, or of an existing title in the mortgagor. Neither of these are to be found in the present case.

We, therefore, agree with the Court below that this suit is barred, and dismiss the appeal with costs.

Appeal dismissed.

PRIVY COUNCIL.

MAHARAJAH OF BURDWAN (DEFENDANT) *v.* TARASUNDARI DEBI (PLAINTIFF.)

P. C.*
1882
November 23.

[On appeal from the High Court at Fort William in Bengal.]

Sale for arrears of rent—Regulation VIII of 1819, *s.* 8, *cl.* 2—*Proof of publication of notice before sale of patni taluk for arrears of rent.*

The due publication of the notices prescribed by Regulation VIII of 1819 s. 8, cl. 2, forms an essential part of the foundation on which the summary power to sell a patni taluk for non-payment of rent is exercised by the zemindar, who, when instituting this proceeding, is exclusively responsible for such publication being regularly conducted.

Although objection to the form of the receipt, and the absence of the receipt itself, need not be regarded, if the fact of the due publication of the notices having been made is not a matter of controversy (as held in *Sona Beebee* v. *Lalchand Chowdhry* (1); yet where that fact was in doubt owing to the evidence of it not having been secured according to the provisions of the Regulation—a result due to the neglect of those representing the zemindar—the finding of the High Court that due publication had not been established by such proofs as were forthcoming, was maintained by the Judicial Committee.

APPEAL from a decree of the High Court (22nd March 1880) reversing a decree of the Judge of the District of East Burdwan (2nd May 1878).

The question raised on this appeal was whether or not before the sale of the respondent's patni taluk, for arrears of rent due

* *Present:* LORD FITZGERALD, SIR B. PEACOCK, SIR R. COUCH, and SIR A. HOBHOUSE.

(1) 9 W. R., 242.

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to the zemindar, there had been sufficient notification, according to Regulation VIII of 1819, s. 8, cl. 2, of the intended sale.

The patni tenure sold under that Regulation was lot Salmula in the East Burdwan district, formerly held by Brojomohun Banerji as patnidar. It was sold for default in payment of rent due to the zemindar for the half-year ending 1284 B. S., by public auction on the 8th Aughran 1284 (November 22nd, 1877), and was bought by Rash Behari Ghose, the highest bidder, for Rs. 2,000.

The present suit was afterwards instituted in the Court of the Judge of East Burdwan, alleging absence of the notice of the intended sale required by Regulation VIII of 1819 on Salmula. The defence was that the notice required had been duly published upon the land of the defaulter. At the hearing it appeared that notifications had been duly made at the Collector's kutchery, and in the Sadr kutchery of the zemindar; but the question was whether the notice required to be published on the land belonging to the defaulter had been duly given; and the Judge, upon the evidence, found that it had, although the serving peon had not brought back the receipt required. On this point the Judge was of opinion that the sale was not void and useless merely on account of this omission, although the Regulation required the receipt to be taken and filed. In this respect he considered the provisions of the Regulation to be merely directory. The suit was accordingly dismissed. On appeal to the High Court that judgment was reversed. The Judges of a Division Bench (WHITE, J., and MACLEAN, J.), there being no independent evidence that the peon had been entrusted with service of the notice in question, and none, except his own, to show that he even went to Salmula, found that the due publication of the notice had not been proved.

The facts, and the provisions of Regulation VIII of 1819, are stated in their Lordships' judgment.

On this appeal—

Mr. *T. H. Cowie, Q.C.*, and Mr. *C. W. Arathoon* appeared for the appellant.

The respondent did not appear.

For the appellant it was argued that the weight of the evidence was in favor of the conclusion at which the District Judge had arrived. A substantial compliance with the requirements of Regulation VIII of 1819 had been shown. Reference was made to *Sona Beebee* v. *Lalchand Chowdhry* (1); *Ram Sabuk Bose* v. *Monmohini Dossee* (2); and *Pitambar Panda* v. *Damoodur Doss* (3).

The judgment of their Lordships was delivered by

LORD FITZGERALD.—This case comes before us *ex parte*. The suit was to set aside a sale of a patni taluk, which took place by auction for non-payment of rent, the allegation of the respondent, who was the plaintiff in the suit, being that the sale was illegal in consequence of the non-observance of Regulation VIII of 1819. By that regulation it is provided, with reference to cases where sales are to take place in certain districts and under certain circumstances for non-payment of rent, "that before the first day of Baisakh of the following year from that of which the rent is due, the zemindar shall present a petition to the Civil Court of the district, and a similar one to the Collector, containing a specification of any balances that may be due to him on account of the expired year, from all or any of the talukdars or other holders of an interest of the nature described in the preceding clause of this section." Having presented this petition both to the Civil Court and to the Collector, "the same shall then be stuck up in some conspicuous part of the kutchery, with a notice that, if the amounts claimed be not paid before the first of Jeyt following, the tenures of the defaulters will on that day be sold by public sale in liquidation." Then it provides that "a similar notice shall be stuck up at the Sadr kutchery of the zemindar himself, and a copy or extract of such part of the notice as may apply to the individual case shall be by him sent to be similarly published at the kutchery, or at the principal town or village upon the land of the defaulter." It is admitted that there was a compliance with the two earlier provisions, but the

(1) 9 W. R., 242.
(2) L. R. 2 I A., 71: S. C. 14 B L. R., 394; 23 W R., 113
(3) 24 W. R., 129.

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question arises whether a copy or extract of the notice applying to the individual case was sent by the zemindar to be published "at the kutchery of the principal town or village upon the land of the defaulter." The Regulation goes on: "The zemindar shall be exclusively answerable for the observation of the forms above prescribed, and the notice required to be sent into the mofussil shall be served by a single peon, who shall bring back the receipt of the defaulter or of his manager for the same; or in the event of inability to procure this, the signatures of three substantial persons residing in the neighbourhood, in attestation of the notice having been brought and published on the spot. If it shall appear from the tenor of the receipt or attestation in question that the notice has been published at any time previous to the 15th of the month of Baisakh, it shall be a sufficient warrant for the sale to proceed upon the day appointed. In case the people of the village should object or refuse to sign their names in attestation, the peon shall go to the kutchery of the nearest Munsiff, or, if there should be no Munsiff, to the nearest thana, and there make voluntary oath of the same having been duly published, a certificate to which effect shall be signed and sealed by the said officers and delivered to the peon." That is a very important Regulation, and no doubt it was enacted for a certain and defined policy, and ought, as a rule, to be strictly observed. Their Lordships desire to point out that the due publication of the notices prescribed by the Regulation forms an essential portion of the foundation on which the summary power of sale is exercised, and makes the zemindar, who institutes the proceeding, exclusively responsible for its regularity. Their Lordships do not, however, intend at all to controvert a decision to which their attention was called, of Sir Barnes Peacock, when he filled the office of Chief Justice of the High Court of Bengal, to the effect that if the notice itself has been duly published, if it is not matter of controversy, if the fact was ascertained that it was published, then one would not regard any objection either to the form of the receipt or the absence of the receipt itself. That decision was alluded to in a case before this tribunal, in which their Lordships say they are disposed to agree with the judgment of the High Court confined as it is to cases where there is proof that the notice

was duly served. That, again, is where there is no controversy as to the fact of the service. It seems to their Lordships that the object of the Regulation was that due service or publication should not be left matter of controversy. The evidence should be secured immediately afterwards, and exist in writing, and be referred to by the proper officer as part of the foundation of the sale. Accordingly, if, immediately upon posting the notice, the peon posting it can find the defaulter or his manager, he is bound to ask for a receipt from the defaulter or his manager, signed under his hand, and if he gets such a receipt there is an end to all question as to the service. If he does not find the defaulter or his manager, or if that person will not sign a receipt, then he is to call in three substantial people of the village to attest the fact, which will be apparent to their eyes, that the notices in question have been published. If they object, as very likely villagers would object, to be parties to the proceedings for the enforcement of a sale, then he is obliged to go to the nearest Munsiff, and make a voluntary oath of the fact of service, which act is immediately recorded, and forms the foundation upon which the officer afterwards proceeds in carrying out his sale. Thus the evidence that the notice has been given is immediately preserved, and the fact is not left to be matter of controversy afterwards.

The issue in this case is as to whether the provisions of Regulation VIII of 1819 have been complied with. The case before us differs from that before the Chief Justice of Bengal, and equally from that case which was before this tribunal, in this, that the fact of service here is matter of controversy. We should be obliged to assume, in order to arrive at a conclusion one way or the other, either that there was a conspiracy to cheat and deceive upon the part of the plaintiff Charoo and the two chowkidars who are represented to have assisted in the fraud, or that there was a conspiracy on the part of the peon sent to effect this publication, who, having, it is said, neglected his duty, conspired afterwards with a confederate to make a false statement and forge a receipt.

The Judge in the primary Court delivered his judgment in favour of the appellant. He had the advantage of seeing and

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hearing the witnesses, and he has expressed his decision in vigorous language. But there was an appeal on the question of fact, and upon that question of fact two Judges of the High Court have concurred in thinking that the Judge of the Court below was wrong, and have come to the conclusion that the plaintiff and her witnesses have told the truth. It shows that not alone is the fact of publication in controversy, but that the matter is so involved that it is difficult to come to a safe conclusion upon it. Their Lordships do not propose to say upon this controverted question of publication on which side the weight of evidence lies.

Their Lordships will humbly advise Her Majesty to affirm the decision of the High Court, and upon this ground: The doubt or difficulty in the case is one that would not have existed save by the neglect of those representing the Maharajah. There is no evidence save the statement of the peon Khetu that the notice was ever entrusted to him; but supposing it was entrusted to him for publication, his duty, and that of the officers of the Maharajah, would have been clear and plain. He should have ascertained when he went to make the service that the person whom he represents to be Charoo, to whom he says he delivered the notice, was the defaulter or the agent of the defaulter. He should then have obtained his receipt, a receipt proper in form. If he could not obtain it he should have followed the course prescribed by the Regulation, and should at once have returned the documents to the proper officer of the Maharajah. It would then have been the duty of that officer to examine the receipt and see that it was in all respects complete and regular as part of the foundation of the title afterwards to be given by sale. Their Lordships have before them a copy of the supposed receipt, which appears to be enveloped in mystery from the time it was alleged to have been signed. The peon gives no history of it. What did he do with it? To whom did he give it? Where has it been? All that is left in obscurity, and no confirmatory proof is produced from amongst the servants of the Maharajah that the peon, having effected what he alleged to be service, brought in this receipt with him, and filed it in the Collectorate or with the proper officer of the district. What

is the document itself when we come to look at it? The professed signatures are at the top. The first is that of Brojomohun Banerji. That purports to be the name, not quite the correct name, of the registered proprietor of the taluk, who has been dead many years, and if this had been brought to and examined by the servants of the Maharajah they must have seen that the dead man could not have signed it; there is no doubt that they knew that this registered proprietor was not alive. The next signature is that of Redoynath Banerji, who is put down as the karpurdaz, meaning the karpurdaz of the dead man, Brojomohun Banerji. This turns out to be a non-existing individual; there is no such person. Then we come to the attesting witnesses at the foot, and they are Goburdhun Chowkidar and Gopal Chowkidar, residents of Salmula. The inference from that would be that they were the chowkidars of Salmula. If there are such persons in existence, there are no such chowkidars at Salmula, and neither of the chowkidars of Salmula have been produced on either one side or the other. This document or receipt so produced by the peon is by no means a compliance with the provision of Regulation VIII. Their Lordships think that the absence of that care and attention which ought to have been shown with reference to this document, and the absence of any contemporaneous inquiry whether there had or had not been a publication of this notice, as required by the regulation, has created the very difficulty which the Regulation was intended to prevent; and as the regulation makes the zemindar exclusively answerable for the observance of its provisions, their Lordships are of opinion that the issue as to the Regulation ought to be found in favor of the respondent; and will therefore humbly report to Her Majesty, as their opinion, that the decree of the High Court of Judicature ought to be affirmed, and this appeal dismissed with costs.

Appeal dismissed.

Solicitor for the appellant: Mr. *T. L. Wilson.*

APPELLATE CIVIL.

Before Mr. Justice Cunningham and Mr. Justice Maclean.

1883. *February 7.*

IN THE MATTER OF THE PETITION OF RAM COOMAR DEY.

RAM COOMAR DEY *v.* SHUSHEE BHOOSHUN GHOSE AND ANOTHER.*

Sale in execution of decree—Civil Procedure Code (Act XIV of 1882), *s.* 313.

Section 313 of the Civil Procedure Code only applies to cases in which the judgment-debtor has no saleable interest in the property sold. It does not apply to cases where the judgment-debtor has no saleable interest in a portion only of the property.

THE facts of this case and the question raised in argument are stated in the following judgment of the lower Court: "The auction-purchaser applies for the setting aside of the sale, on the ground that the judgment-debtor really owned an eight annas share of the property sold, and the sale professes to be of sixteen annas. The question is whether under s. 313 of the Civil Procedure Code the sale is liable to be set aside on that ground.

"I think the provisions of the section are clear, and under them a sale can be annulled only where the judgment-debtor had no saleable interest in the property sold. Here that is not the case. I am referred to s. 287, and the High Court rules governing the settlement of the sale proclamation; these are undoubtedly authorities, and in the light of which the regularity of the publication of the sale proclamation should be determined.

"But regularity of a proclamation, or no regularity, does not in any way concern the purchaser, and it does not lie within his capability to raise a question of irregularity as vitiating the sale.

"I am told that in regard to the eight annas, in which judgment-debtor has no right, it might be designated as property in which no saleable interest belonged to him within the meaning of the

* Appeal from Original Order (No. 366 of 1882) against the order of Baboo Bulloram Mullick, Second Subordinate Judge of the 24-Pergunnahs, dated the 23rd September 1882.

Statute, but it should be borne in mind that the property was not sold in halves, and the purchaser has no right to draw an imaginary line of separation between them. The sale will be confirmed, and the auction-purchaser's application should be disallowed with costs."

The purchaser appealed to the High Court.

Baboo *Amarendro Nath Chatterjee* for the appellant.

Baboo *Rajendro Nath Bose* for the respondents.

The judgment of the Court (CUNNINGHAM and MACLEAN, JJ.) was delivered by

CUNNINGHAM, J.—We think that the construction put by the Court below upon s. 313 of the Code of Civil Procedure was correct, and that the case of *Naharmul Marwari* v. *Sadut Ali* (1), does not bind us, because in that case the learned Judges considered that a state of things had come about in which the judgment-debtor had no saleable interest. In the present instance it is admitted that he has a saleable interest to the extent of eight annas. That being so we think we cannot hold that the case falls within the scope of s. 313. The appeal must, therefore, be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Wilson and Mr. Justice Field.

LUCKY CHURN CHOWDHRY (PLAINTIFF) *v.* BUDURRUNNISSA AND OTHERS (DEFENDANTS).*

1882 *August* 15.

Appeal—Dismissal of Suit—Summons not served—Civil Procedure Code (Act X of 1877), *ss.* 97, 588.

An order under s. 97 of the Civil Procedure Code dismissing a suit on it being found that the summons has not been served on the defendant, in consequence of the failure of the plaintiff to pay the Court-fee leviable for such service, is not appealable.

* Appeal from Appellate Decree No. 682 of 1881, against the decree of Baboo Mothoora Nath Gupto, Subordinate Judge of Chittagong, dated the 27th January 1881, affirming the decree of Baboo Hurro Chunder Dass, Munsiff of South Roujan, dated the 30th April 1880.

(1) 8 C. L. R., 468.

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LUCKY CHURN CHOWDHRY v. BUDURUN-NISSA.

Baboo *Aukhil Chunder Sen* for the appellant.

Munshi *Serajul Islam* for the respondents.

THE facts of this case sufficiently appear from the judgment of the Court (WILSON and FIELD, JJ.), which was delivered by

WILSON, J.—We are disposed to think that this appeal will not lie. The order that is sought to be appealed against is one under s. 97 of the Civil Procedure Code, which says: "If, on the day so fixed for the defendant to appear and answer, it be found that the summons has not been served upon him, in consequence of the failure of the plaintiff to pay the Court-fee leviable for such service, the Court may order that the case be dismissed." The question is whether there is an appeal against such dismissal when no appeal is expressly given either in s. 588 or elsewhere. Section 588 says that an appeal will lie against a decree. A decree is defined in the interpretation clause as "the formal expression of an adjudication upon any right claimed, or defence set up, in a Civil Court when such adjudication, so far as regards the Court expressing it, decides the suit or appeal." A decree, therefore, must be an expression of opinion upon the rights of the parties; but this was a dismissal on a ground wholly apart from the merits of the case. We are, therefore, disposed to think that this is not a decree, but an order only. That view is confirmed by the latter part of the definition of a decree which expressly says that a certain class of orders, more or less analogous to those made under s. 97, shall be decrees, but says nothing of orders made under s. 97. Then again a large number of orders analogous to those made under s. 97 are expressly made appealable under s. 588, whereas orders under s. 97 are not mentioned. But however that may be, there are certainly no grounds on the merits of the case to lead us to interfere.

The decision of the Subordinate Judge was right, and the appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Maclean and Mr. Justice O'Kinealy.

BHOBOTARINI DEBI (PLAINTIFF) *v.* SREE RAM PAUL (DEFENDANT).*

1883 *January* 9.

Practice—Plaint—Infant plaintiff—Next friend—Form of plaint—Title of plaint.

A suit was brought by a minor, who appeared by her next friend, and a decree was given in her favour. The defendant appealed, making the next friend alone respondent, and had the decree of the Court of first instance modified in his favour. The next friend appealed to the High Court, where the respondent objected to the next friend being heard, on the ground that she was no party to the suit.

Held, that the Court would not entertain the objection at the instance of the party through whose fault the error occurred, but that the judgment of the Court below should be set aside, and that of the Court of first instance restored.

ON the 9th of December 1878, the plaint in this case was filed in the Munsiff's Court at Ranaghat. The title of the plaint is as follows: "*Suttobali Debi*, minor, represented by her guardian, Bhobotarini Debi of Santipur, Station Santipur, by profession zemindar, *plaintiff* v. *Sree Ram Paul*, son of the late *Ram Mohun Paul*, of Santipur, by profession a service-holder, *defendant*." The plaintiff's claim was decreed by the Court of first instance, and the defendant appealed. In the appeal the defendant dropped the name of the minor, and entered on the record as respondent the name of Bhobotarini Debi. The Subordinate Judge struck off a sum of Rs. 208 from the amount decreed by the Munsiff in favour of the plaintiff, and gave a proportionate amount of costs to the respondent. From this decision Bhobotarini Debi appealed to the High Court.

Baboo *Jussoda Nundun Paramanick* for the respondent objected that the appellant had no *locus standi*.

Baboo *Nil Madhub Bose* for the appellant.

* Appeal from Appellate Decree No. 843 of 1881, against the decree of Baboo Amrito Lall Chatterjee, Subordinate Judge of Nuddea, dated the 25th February 1881, modifying the decree of Baboo Rajendro Coomar Bose, Munsiff of Ranaghat, dated the 31st March 1879.

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BHOBO-TARINI DEBI v. SREE RAM PAUL.

The judgment of the Court (MACLEAN and O'KINEALY, JJ.) was delivered by

MACLEAN, J.—The respondent's pleader objects to our hearing this appeal on the ground that the plaintiff, appellant, Bhobotarini Debi, was not the plaintiff in the original suit, and that therefore she has no *locus standi* in this Court. It is a matter of surprise that this objection should have been raised here, because we find that the person who is now appellant before us was alone placed upon the record in the lower Appellate Court as respondent. We cannot, therefore, allow the objection to bar the hearing of this appeal. The appellant's vakeel recognizes his situation and asks us to set aside the judgment of the lower Appellate Court, which is adverse to her in saddling her with costs, on the ground that she was not liable under the Munsiff's decree and was in fact improperly made respondent in the Court below. We think there is no way out of the respondent's dilemma. Having omitted to make Suttobali Debi, the real plaintiff, respondent in the lower Appellate Court, he has lost his opportunity of questioning the Munsiff's decree in her favour. The decree of the lower Appellate Court, modifying the Munsiff's decree, is valueless and should be set aside. As the ground upon which we set aside the decree of the lower Appellate Court was not taken by the appellant before us in the memorandum of appeal, we cannot allow her any costs. The appeal is decreed without costs, the decree of the Subordinate Judge is set aside, and the decree of the Munsiff is restored.

Appeal allowed.

Before Mr Justice Prinsep and Mr Justice O'Kinealy

KALLY PROSUNNO BISWAS AND ANOTHER (PLAINTIFFS) *v.* MUNGALA DASSEE AND ANOTHER (DEFENDANTS) *

1883 *February* 1

Civil Procedure Code, Act XIV of 1882, *s* 561—*Limitation Act XV of* 1877, *s* 5—*Cross Appeal—Notice of Objection.*

A notice of objection under s. 561 of the Code of Civil Procedure, Act XIV of 1882, must be filed not less than seven days before the date (if any) fixed for the hearing of the appeal in the notice served upon the respondent

Section 5 of Act XV of 1877 does not apply to an objection under s 561 of the Procedure Code.

THIS was a suit for possession of certain lands claimed by the plaintiffs to be portion of their ancestral property. On the 10th of February 1881, the Court of first instance decreed a portion of the plaintiffs' claim only, and against this decision the plaintiffs appealed. The day fixed for the hearing of the appeal, under s. 552 of the Code of Civil Procedure, was the 11th of June 1881. One of the respondents filed a memorandum of objections, under s. 561 of the Code of Civil Procedure, on the 14th of June 1881, more than seven days before the appeal was actually heard.

In reference to this the Judge of the lower Appellate Court said: "The respondent Dwarka Nath has made a cross appeal. It is objected that notice of it was not given to the appellant in proper time, but s. 561 does not require notice to be given to the appellant, but it merely provides that it is to be filed at least seven days before the hearing. In the present case the cross appeal was filed before that time, and it was tantamount to filing notice of the cross appeal." The Judge dismissed the appeal and decreed the cross appeal with costs. The plaintiffs appealed to the High Court, on the ground that the Judge was wrong in entertaining the cross appeal.

* Appeal from Appellate Decree No 145 of 1882, against the decree of Baboo Promothe Nath Mookerjee, Additional Subordinate Judge of Burdwan, dated the 10th November 1881, modifying the decree of Baboo Khetter Prosad Mookerjee, Munsiff of Culna, dated the 10th February 1881

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KALLY PROSUNNO BISWAS v. MUNGALA DASSEE.

Baboo *Boido Nath Dutt* for the appellants.

Baboo *Rashbehary Ghose* for the respondents.

The following judgments were delivered :—

PRINSEP, J.—It seems clear from the record that the lower Appellate Court has wrongly admitted what has been termed a cross appeal, but what, strictly speaking, is an objection taken by the respondent under s. 561 of the Code. The day fixed for the hearing of the appeal in the lower Appellate Court was, according to the notice served on the respondent, the 11th of June 1881. Therefore, according to the terms of s. 561, as interpreted by a Division Bench of this Court, the notice of the objection, that is, the written petition of objection itself, should have been filed in the lower Appellate Court not less than seven days before the day fixed for the hearing of the appeal, namely, the 11th June. It was not filed till the 14th June. The only provision made by the Legislature for extending the period of limitation is to be found in the second clause of s. 5 of the Limitation Act (XV of 1877); and as has already been pointed out in the case of *Degamber Mozumdar* v. *Kallynath Roy* (1), that provision does not apply to anything, except an appeal or application for review of judgment, and therefore does not apply to an objection under s. 561.

The decree of the lower Appellate Court must accordingly be amended so far only as it relates to the cross appeal.

The appellant will receive his costs in this Court.

O'KINEALY, J.—I understand that the interpretation just put by Mr. Justice Prinsep on s. 561 of the Code of Civil Procedure has been adopted by several Benches of this Court. I am not prepared to dissent, but were I unfettered by any previous decision I should have considerable difficulty in coming to the conclusion that the seven days referred to in s. 561 mean seven days before the date fixed in the notice of appeal.

Appeal allowed.

(1) I L R, 7 Calc., 654

Before Mr. Justice Wilson and Mr. Justice Field.

DENONATH CHUCKERBUTTY (JUDGMENT-DEBTOR) *v.* LALLIT COOMAR GANGOPADHYA (DECREE-HOLDER).*

1882 *August* 22.

Limitation (Act XV of 1877.) *Sch. II, Art.* 179, *cl.* 4—*Application for execution of decree by benamidar.*

An application for execution of a decree by a mere benamidar is not an application *in accordance with law* within the meaning of Art. 179, cl. 4 of Sch. II of the Limitation Act (XV of 1877), such as to afford a fresh starting point for limitation.

THE application out of which this appeal arose was made on the 9th December 1880 by Lallit Coomar Gangopadhya, who held a decree against Koilash Nath Dutt Rai, and was for execution of a decree, dated the 7th June 1877, which Koilash Nath Dutt Rai had obtained against Denonath Chuckerbutty.

The only previous application for execution of the latter decree had been made on the 1st of June 1880 by one Nobin Chunder Bhattacharjya, who alleged that he had purchased the decree from Koilash Nath Dutt Rai. Lallit Coomar Gangopadhya had opposed that application on the ground that he had attached the decree, and that Nobin Chunder Bhattacharjya was merely a benamidar for Koilash Nath Dutt Rai; and on the 4th of December 1880 Nobin Chunder Bhattacharjya withdrew his application.

In the present application it was found as a fact that Nobin Chunder Bhattacharjya had applied for execution merely as benamidar for Koilash Nath Dutt Rai.

The first Court held that the present application was barred by limitation, and accordingly rejected it.

The lower Appellate Court reversed this order, and allowed the application, citing *Syud Nadir Hossein* v. *Baboo Pearoo Thovildarinee* (1), and *Purna Chandra Roy* v. *Abhaya Chandra Roy* (2),

* Appeal from Appellate Order No. 107 of 1882, against the order of T. M. Kirkwood, Esq., Judge of Mymensingh, dated the 25th February 1882, reversing the order of Baboo Nobin Chunder Ghose, Subordinate Judge of that district, dated the 6th August 1881.

(1) 14 B. L. R., 425: 19 W. R., 255.

(2) 4 B. L. R., Ap., 40.

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as authority for its decision, and holding that *Abdul Kureem* v. *Chukhun* (3) did not apply in the present case.

Denonath Chuckerbutty, the judgment-debtor, appealed to the High Court.

Baboo *Grija Sunkur Mozoomdar* for the appellant.

Baboo *Jogesh Chunder Roy* for the respondent.

The judgment of the Court (WILSON and FIELD, J.J.) was delivered by

WILSON J.—This is an appeal against an order allowing an application for execution of a decree. The decree bears date the 7th of June 1877, and was in favour of Koilash Nath Dutt Rai. On the 1st of June 1880 one Nobin Chunder Bhattacharjya applied for execution claiming it as assignee of the decree. It is found as a fact that he was a mere benamidar for the original decree-holder. The present application, which is made by a person who has attached the decree, was made on the 9th of December 1880. The question raised is, whether this application is barred by limitation. If the period of limitation runs from the date of the decree there is no doubt that the application is too late. If the period runs from the former application for execution there is no doubt that it is in time. We have, therefore, to say whether an application for execution by a mere benamidar is an application "in accordance with law" within the meaning of Art. 179, cl. 4 of Sch. II, of the Limitation Act. It has already been held in *Abdul Kureem* v. *Chukhun* (3) that where a decree is held in the name of a benamidar the proper person to apply for execution is the real decree-holder, and in that view we fully concur. It follows that an application by the benamidar is not an application in accordance with law.

The appeal will, therefore, be allowed, and the order for execution set aside with costs in all Courts.

Appeal allowed.

(3) 5 C. L. R., 253.

Before Mr. Justice Prinsep and Mr Justice Wilson.

RUGHU NATH SINGH MANKU (DECREE-HOLDER) *v.* PARESHRAM MAHATA AND ANOTHER (JUDGMENT-DEBTORS).*

1882 *November* 30.

Limitation Act XV of 1877, s. 4—Appeal—Cross Appeal—Jurisdiction of Appellate Court—Question of limitation not raised in cross appeal.

On an application for execution of decree, the application was granted, but the interest claimed by the decree-holder on the amount of the decree was disallowed. The decree-holder appealed from the order, but the judgment-debtor filed no cross appeal On the hearing of the appeal the application for execution was dismissed, on the ground that the execution of the decree was barred by limitation.

Held, that, under the circumstances of the case, the Appellate Court was not competent to take the question of limitation into consideration.

Alimannissa Khatoon v. *Syed Hossein Ali* (1) followed.

THIS was an application for execution of decree. The application was granted by the Court of first instance, but the rate of interest claimed by the decree-holder was disallowed. The decree-holder then appealed. The judgment of the Appellate Court, so far as material, was as follows :—

"The appeal in this case relates to the question of interest. The respondents have not cross appealed; but their pleader raises an objection in bar which must be first considered. He urges that the decree was barred by limitation. This point was raised in the Court below, and decided in the appellant's favour. The question is, can the Appellate Court interfere with the Munsiff's judgment on a point decided by that Judge in that judgment and not appealed against? Ordinarily, no doubt, it cannot, but the point of limitation must, it seems to me, be considered, even though it be not pleaded—See s. 4, Act XV of 1877. I think, therefore, that the argument must be admitted and disposed of."

The lower Appellate Court then decided that the application

* Appeal from Appellate Order No. 173 of 1882, against the order of A. L. Clay, Esq, Officiating Deputy Commissioner of Manbhoom, dated the 14th March 1882, modifying the order of Baboo Krishnadhan Chowdhuri, Munsiff of Chowkee Burabazar, dated the 21st May 1881.

(1) 6 C L R, 267.

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as authority for its decision, and holding that *Abdul Kureem* v. *Chukhun* (3) did not apply in the present case.

Denonath Chuckerbutty, the judgment-debtor, appealed to the High Court.

Baboo *Grija Sunkur Mozoomdar* for the appellant.

Baboo *Jogesh Chunder Roy* for the respondent.

The judgment of the Court (WILSON and FIELD, J.J.) was delivered by

WILSON J.—This is an appeal against an order allowing an application for execution of a decree. The decree bears date the 7th of June 1877, and was in favour of Koilash Nath Dutt Rai. On the 1st of June 1880 one Nobin Chunder Bhattacharjya applied for execution claiming it as assignee of the decree. It is found as a fact that he was a mere benamidar for the original decree-holder. The present application, which is made by a person who has attached the decree, was made on the 9th of December 1880. The question raised is, whether this application is barred by limitation. If the period of limitation runs from the date of the decree there is no doubt that the application is too late. If the period runs from the former application for execution there is no doubt that it is in time. We have, therefore, to say whether an application for execution by a mere benamidar is an application "in accordance with law" within the meaning of Art. 179, cl. 4 of Sch. II, of the Limitation Act. It has already been held in *Abdul Kureem* v. *Chukhun* (3) that where a decree is held in the name of a benamidar the proper person to apply for execution is the real decree-holder, and in that view we fully concur. It follows that an application by the benamidar is not an application in accordance with law.

The appeal will, therefore, be allowed, and the order for execution set aside with costs in all Courts.

Appeal allowed.

(3) 5 C. L. R., 253.

Before Mr. Justice Prinsep and Mr Justice Wilson.

RUGHU NATH SINGH MANKU (DECREE-HOLDER) *v.* PARESHRAM MAHATA AND ANOTHER (JUDGMENT-DEBTORS) *

1882 *November* 30.

Limitation Act XV of 1877, s. 4—Appeal—Cross Appeal—Jurisdiction of Appellate Court—Question of limitation not raised in cross appeal.

On an application for execution of decree, the application was granted, but the interest claimed by the decree-holder on the amount of the decree was disallowed. The decree-holder appealed from the order, but the judgment-debtor filed no cross appeal On the hearing of the appeal the application for execution was dismissed, on the ground that the execution of the decree was barred by limitation.

Held, that, under the circumstances of the case, the Appellate Court was not competent to take the question of limitation into consideration.

Alimannissa Khatoon v. *Syed Hossein Ali* (1) followed.

THIS was an application for execution of decree. The application was granted by the Court of first instance, but the rate of interest claimed by the decree-holder was disallowed. The decree-holder then appealed. The judgment of the Appellate Court, so far as material, was as follows :—

"The appeal in this case relates to the question of interest. The respondents have not cross appealed; but their pleader raises an objection in bar which must be first considered. He urges that the decree was barred by limitation. This point was raised in the Court below, and decided in the appellant's favour. The question is, can the Appellate Court interfere with the Munsiff's judgment on a point decided by that Judge in that judgment and not appealed against? Ordinarily, no doubt, it cannot, but the point of limitation must, it seems to me, be considered, even though it be not pleaded—See s. 4, Act XV of 1877. I think, therefore, that the argument must be admitted and disposed of."

The lower Appellate Court then decided that the application

* Appeal from Appellate Order No. 173 of 1882, against the order of A. L. Clay, Esq, Officiating Deputy Commissioner of Manbhoom, dated the 14th March 1882, modifying the order of Baboo Krishnadhan Chowdhuri, Munsiff of Chowkee Burabazar, dated the 21st May 1881.

(1) 6 C L R, 207.

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for execution was barred by limitation, and he dismissed it with costs.

The decree-holder appealed to the High Court on the ground, amongst others irrelevant to this report, "That the judgment-debtors not having appealed from the decree of the Munsiff overruling the plea of limitation and allowing execution to issue, the Court of appeal was not competent to interfere with such an order on the appeal of the judgment-creditor, who was dissatisfied with only a part of the Munsiff's order."

Baboo *Rash Behary Ghose* and Baboo *Surender Nath Mutty Lall* for the appellant.

Baboo *Jogesh Chunder Dey* for the respondents.

The following judgments were delivered by the Court (PRINSEP and WILSON, J.J.)—

PRINSEP, J.—The first Court in this case held that the decree was not barred by limitation, and on another point decided in favour of the judgment-debtors.

The decree-holder alone appealed against the latter finding. No objection under s. 561 was taken by the judgment-debtors against the finding as regards limitation which was adverse to him. At the hearing of the appeal, in the course of the argument, the point of limitation was raised, and the lower Appellate Court held that execution was barred.

We are of opinion that the lower Appellate Court was, under the circumstances, not competent to consider this point; and in this respect we concur in the judgment delivered by another Division Bench of this Court in the case of *Alimannissa Khatoon* v. *Syed Hossein Ali* (1). The District Judge has gone beyond the law in stating that "the point of limitation must be considered, even though it be not pleaded." The terms of s. 4 of the Limitation Act declare that a Court has this power *although limitation has not been set up as a defence*; and we think that this has been rightly interpreted, in the judgment already cited, to mean so far as regards the particular suit, or appeal, then under decision before the Court is concerned. The present case differs from the

(1) 6 C. L. R., 267.

precedent cited only in this respect, that in that case the appellant had not made the question of limitation one of the grounds of appeal. In the case before us the judgment-debtors, against whom the judgment of the first Court on this point was pressed, did not appeal against it, nor did they, when the decree-holder appealed, make any objection in writing within the terms of s. 561. Under these circumstances the lower Appellate Court was not competent to re-open the point. The order of the lower Appellate Court must therefore be reversed, and that of the first Court restored. The decree-holder will be entitled to costs, both in this Court and in the lower Appellate Court.

WILSON, J.—I am entirely of the same opinion. The effect of s. 4 of the Limitation Act, as I understand it, is simply this: Whenever a case is properly before a Court, whether it is a Court of appeal or a Court of first instance, it is bound to take notice of the question of limitation; but in order to enable the Appellate Court to do that the case must be before it. In the present case the order objected to was not before the Court below at all in its entirety, but only a portion of it. The whole might have been brought before the Court by appeal, or by cross appeal only on objection under s. 561 of the Code. That was not done. The lower Appellate Court therefore had no right to enter into the question of limitation, affecting that part of the order which was not before it.

Appeal allowed.

APPELLATE CRIMINAL.

Before Mr. Justice Mitter and Mr. Justice Field.

THE EMPRESS *v.* BROJOKANTO ROY CHOWDHURI.*

1883 *February* 28.

Criminal Procedure Code (X of 1882), s. 133—Nuisance—Erection of Buildings—Unconditional order.

Every order made under s. 133 of the Code of Criminal Procedure, Act X of 1882, must appoint a time within which, and a place where, the person to whom it is directed may appear before the Magistrate, and move to have the order set aside or modified.

No unconditional order can be made under that section.

* Criminal Reference No. 16 of 1883, and letter No. $\frac{C}{36}$, from the order made by J. F. Bradbury Esq., Officiating Sessions Judge of Backergunge, dated the 21st February 1883.

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THIS was a reference to the High Court by the Sessions Judge of Backergunge, to set aside an order made by the Deputy Magistrate of Putuakhali. The facts of the case are thus stated by the Sessions Judge: "On the 5th of January last the Deputy Magistrate addressed to the applicant for revision, an order, which after reciting that last year the official residence of the subdivisional officers of Putuakhali with its out-offices was destroyed by fire, that he apprehended a recurrence of such a calamity, and that the propriety of directing the applicant to remove his bazar to a distance from the subdivisional officers' abode was under consideration, forbad the applicant (1), to erect or cause or permit to be erected within his bazar (he is the proprietor of the soil on which stand the shops and other buildings that constitute the bazar) or within the prostitute's quarter, any thatched buildings, or buildings constructed of easily combustible materials; (2), to repair and cause or permit to be repaired within the aforesaid limits, any such buildings, and enjoined him to put a stop to the creation of such buildings, which had been undertaken within such limits prior to the issue of the Deputy Magistrate's order.

"The order served on the applicant is annexed to the application for revision. It purports to have been promulgated under s. 133 Criminal Procedure Code, but in lieu of being conditional peremptorily requires compliance therewith in ten days, and threatens the applicant with pains and penalties in the event of disregard thereof. It appoints no time or place for shewing cause against it, nor does it intimate that the applicant will have an opportunity of moving a Magistrate to set it aside or modify it." The Sessions Judge then went on to say that the Deputy Magistrate had given an explanation of his proceedings, but that in such explanation he had "overlooked the one irregularity which is fatal to the validity of his order, namely, its unconditional character."

No one appeared to argue the case.

The judgment of the Court (MITTER and FIELD, JJ.) was delivered by

MITTER, J.—We agree with the Sessions Judge that the order of the Deputy Magistrate of Putuakhali, purporting to have been passed under s. 133, Criminal Procedure Code is illegal, and

should be set aside on the ground that it is unconditional. As required by the section, it does not appoint any time or place within which and where the person to whom it is directed may appear before the Deputy Magistrate himself, or some other Magistrate of the first or second class, and move to have the order set aside or modified. We accordingly set aside the order, which the Sessions Judge recommends to be set aside.

Order set aside.

Before Mr. Justice Wilson and Mr. Justice Maclean.

IN THE MATTER OF PEARY MOHUN SIRCAR AND OTHERS.

PEARY MOHUN SIRCAR *v.* THE EMPRESS. *

1883 *March* 1.

Unlawful Assembly—Penal Code, Act XLV of 1860, *s.* 143.

On the trial of certain persons charged with being members of an unlawful assembly, it was proved that there was a dispute of long standing between the accused and certain other parties regarding the possession of certain land; that neither of the parties was in undisturbed possession of the land; that the accused went to sow the land with indigo, accompanied by a body of men armed with *lattics*; that they were prepared to use force if necessary; and that the *lattials* kept off the opposite party by brandishing their weapons while the land was sowed.

Held, that the accused were rightly convicted of being members of an unlawful assembly, under s. 143 of the Penal Code.

Sunker Singh v. *Burmah Mahto* (1), distinguished.

IN this case the prisoners were convicted by the Joint Magistrate of Rajshahye of being members of an unlawful assembly and sentenced to three months' rigorous imprisonment, under s. 143 of the Indian Penal Code. The prisoners appealed to the Sessions Judge of Rajshahye, the material portion of whose judgment was as follows :—

It does not seem to be seriously denied in this case that the retainers of Messrs. Watson & Co. went in a large body to sow down indigo on the lands which are referred to by the witnesses, and that many of these retainers were armed. This fact is proved by the clearest evidence, and the evidence of the constable Permeshwar Singh shows that while the *lattials* were brandishing their *lattics*, some fifty persons sowed down the lands in indigo. The pleader for Messrs. Robert Watson & Co., relying upon the

* Criminal Motion No. 32 of 1883, against the order of L. Hare, Esq., Joint Magistrate of Rajshahye, dated the 4th January 1883.

(1) 23 W. R. Cr., 25.

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case of *Shunker Singh* v *Burmah Mahto* (1), contends that the charge in this case cannot be sustained, as the intention of the defendants was not to enforce a right, but to maintain, undisturbed, the subsisting enjoyment of their rights. It seems to me, however, that the ruling above quoted is not applicable to the present case. It referred to the enjoyment of water actually flowing, and to the protection of the then subsisting enjoyment of this right, under circumstances where there was no time to have recourse to the police authorities. In the case now under appeal it is clear that the land, of which the enjoyment is claimed, is disputed land, and was so in April and May 1882, as well as in the following November, when it reappeared from the bed of the Padma river. [The District Judge went on to say that he agreed] with the Joint Magistrate that the evidence on the record is not sufficient to prove conclusively that either party was in *bonâ fide* possession It is clear, however, that both parties claimed the right of possession, and that these claims arose as soon as the disputed land reappeared from the bed of the river. It is the forcible assertion of this claim on the part of the appellants, which is the subject of the present charge against them..... From a review of the whole evidence I concur with the Joint Magistrate in the opinion that the appellants are guilty of the offence of which they have been convicted, and I accordingly dismiss this appeal.

The prisoners moved the High Court for a rule to show cause why the conviction should not be set aside as bad in law.

Mr. *Evans* for the petitioners.

The judgment of the Court (WILSON and MACLEAN, JJ.) was delivered by

WILSON, J.—This was a rule granted to show cause why a conviction should not be set aside on the ground that, assuming the facts found to be correct, the conviction was bad in law. We have had the advantage of hearing the arguments of the petitioner's Counsel, and it appear to us that, assuming the facts found to be correct, the conviction is good in law. The facts found are those: that there was no one in undisputed possession of the land in question, but that a dispute of some considerable standing existed between the two parties as to who was entitled to the land and who was in possession of it; that a number of persons of the petitioner's party went to sow the land, together with a body of men armed with *latties*; that they were prepared to use force, if

(1) 23 W. R., Cr., 25.

necessary ; and that they stationed these *lattials* to keep off the opposite party and these were brandishing their weapons, while the land was sowed. That falls within the definition of the offence, because there was an assembly for the purpose of enforcing a right by criminal force, or shew of criminal force.

It was contended that this case was governed by the case of *Shunker Singh* v. *Burmah Mahto* (1) ; but as was pointed out by the Judge in the appeal Court in this case, that case is distinguishable. It was decided on this ground that what was done there was an act justified by the sections relating to private defence, and it was expressly pointed out that it did not fall under cl. 3 of s. 99 of the Penal Code. There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities. In this case it appears that there was plenty of time to have recourse to the public authorities, therefore the law as to private defence does not apply.

The rule will be discharged.

Rule discharged.

APPELLATE CIVIL.

Before Mr. Justice Maclean and Mr. Justice O'Kinealy.

DWARKA NATH AND OTHERS (PLAINTIFFS) *v.* ALOKE CHUNDER SEAL AND OTHERS (DEFENDANTS).*

1883 *January* 9.

Sale for arrears of rent—Beng. Act VIII of 1869, *ss.* 59, 60—*Sale Certificate—Proclamation of Sale—Under Tenure.*

Held, on the construction of a sale certificate and a proclamation of sale purporting to be made under ss. 59 and 60 of the Rent Act, Beng. Act VIII of 1869, that what passed by the sale was not an under tenure, but merely the right, title and interest of the judgment-debtor therein.

The declaratory portion of a sale proclamation is not by itself sufficient to override the description of the property in the body of the document.

THIS was a suit for possession of a *howla* which the plaintiffs claimed to have purchased in 1871 at a sale held under the provi-

*Appeal from Appellate Decree No. 873 of 1881, against the decree of Baboo Bance Madhub Mitter, Subordinate Judge of Backergunge, dated the 23rd September 1880, modifying the decree of Baboo Doorga Churn Sen, Sudder Munsiff of Burrisal, dated the 30th September 1879.

(1) 23 W. R., Cr., 25.

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sions of ss. 59 and 60 Beng. Act VIII of 1869, in execution of a rent-decree. The defence was, amongst other things, that the tenure did not pass by the sale, but only the right, title and interest of the judgment-debtors. On this point the Judge of the Court of first instance said: "It is manifest, as appears from the sale certificate, that the property was sold under ss. 59 and 60 of the Rent Act, and as such, the plaintiffs would be entitled to obtain the property free from incumbrances of the defaulting tenant." On appeal the Subordinate Judge said: "I find that the sale certificate, which was filed by the plaintiffs, and the certified copy of the sale proclamation, which has been now filed by the respondents, show that the right, title and interest of the judgment-debtors were sold, although in the heading of the sale proclamation it was mentioned that the tenure would be sold, but it is clearly mentioned below that 'দাহানের ভোগ দখলি স্বত্ব' that is the rights which are in possession and enjoyment of the judgment-debtors would be sold. Such being the case the purchaser in such a sale did not purchase the the tenure free from incumbrances—*Dular Chand Sahu* v. *Lal Chabil Chand* (1)." The Subordinate Judge then reversed the decision of the Munsiff, and the plaintiff appealed to the High Court.

Baboo *Bhoobun Mohan Dass* for the appellants.

Baboo *Rash Behari Ghose* for the respondents.

The judgment of the Court (MACLEAN and O'KINEALY, JJ.) was delivered by

MACLEAN, J.—In this case the question to be decided is whether the sale, on the basis of which the plaintiffs sue as purchasers, passed the tenure or only the right, title and interest of the judgment-debtors. It appears that in 1870, the plaintiffs' mother brought a suit for arrears of rent of a *howla* for the years 1274, 1275 and 1276, and obtained a decree on the 19th July. In execution of that decree, the property, on account of which the suit for arrears had been brought, was sold. What was sold is the present dispute. It is contended on behalf of the plaintiffs that since the certificate purports to have been issued under ss. 59 and 60 of the Rent Act, and the Court admittedly had no power to

(1) 3 C. L. R. 561.

sell under that Act anything but the tenure itself, there arises an irrebuttable presumption in favour of the tenure being sold. But when we turn to the notification, under which the sale is declared to have taken place, and the sale certificate, we find that they contain a clear and precise statement showing that what was proclaimed for sale and what was actually sold was not the tenure, but the right, title and interest of the defendants. This too appears to be consonant with the fact that the decree-holders purchased the property for a very small sum. Following the decision of a Division Bench of this Court, in special appeal No. 2752 of 1875, we are of opinion that the declaratory portion of a proclamation is not by itself sufficient to override the description of the property in the body of the document, and that it is not the tenure, but the right, title and interest of the judgment-debtor that was sold in the former suit and purchased. In this view of the case, we uphold the decision of the Subordinate Judge and dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Prinsep and Mr. Justice Wilson.

SRIPOTI CHURN DEY (PLAINTIFF) *v.* MOHIP NARAIN SINGH (DEFENDANT.)*

1883 *February 26.*

Mortgage—Right to redeem—Mokuraridar—Regulation XVII of 1806, *s.* 8 *—Notice of foreclosure.*

The holder of a mourasi mokurari patta under the mortgagor is not a "representative" within the meaning of s 8 of Regulation XVII of 1806, and is therefore not entitled to notice of foreclosure under that section.

Lalla Doorga Pershad v. *Lalla Luchmun Sahoy* (1) followed.

Baboo *Sree Nath Das* and Baboo *Juggut Chunder Banerjee* for the appellant.

Baboo *Ras Behary Ghose* for the respondent.

THE material facts of this case are sufficiently stated in the judgment of the Court (PRINSEP and WILSON, JJ.) which was delivered by

PRINSEP, J.—The facts of this case are as follows: In Assin

* Appeal from Appellate Decree No. 1572 of 1881, against the decree of Baboo Kedar Nath Muzumdar, Second Subordinate Judge of Midnapore, dated the 16th June 1881, reversing the decree of Baboo Dabendro Lal Shome, First Munsiff of that district, dated the 8th March 1880.

(1) 17 W. R., 272.

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and Pous 1276 Ikram Rusul and others executed in favour of the plaintiff a mortgage by way of conditional sale of certain lands. They subsequently granted a mourasi mokurari patta of the same land to the defendant. The plaintiff took foreclosure proceedings under Regulation XVII of 1806, and notice was served upon the mortgagors, but not upon the defendant, and the plaintiff subsequently obtained a decree for possession against the mortgagors. He now sues to set aside the defendant's patta.

The Subordinate Judge, reversing the decision of the Munsiff, has held that the plaintiff's case fails on the ground that the defendant was entitled to redeem the plaintiff's mortgage and therefore ought to have been served with notice of foreclosure under s. 8 of the Regulation.

We do not agree in this view. It was held by a Division Bench of this Court, consisting of Macpherson and Glover, JJ., in *Lalla Doorga Pershad* v. *Lalla Luchmun Sahoy* (1), that a person in the defendant's position is not entitled to redeem, and we think we ought to follow that ruling. And that being so he cannot, we think, be called a representative within the meaning of the section in question.

The decree of the lower Appellate Court will be reversed and that of the Munsiff affirmed with costs in all Courts.

Before Mr. Justice Mitter and Mr. Justice Field.

1883. *March* 1.

RADHA PROSAD SINGH (DECREE-HOLDER) *v.* SUNDUR LALL AND ANOTHER (JUDGMENT-DEBTORS.)*

Limitation Act (XV of 1877) Sch. II, Art. 179—Execution of Decree, Application for—Step in aid of Execution.

On the 28th September 1877 an application was made for execution of a decree. On the 8th July 1878 the decree-holder deposited Rs. 2 as Nilamee fees, that is to say, costs for bringing certain property to sale in execution of the decree. On the 28th March 1881 a further application for execution of the decree was made. *Held*, that the deposit of Rs. 2 as Nilamee fees on the 8th July 1878 was a step in aid of execution of the decree, and that the application of the 28th March 1881, being within three years from the date of the deposit, was not barred by limitation.

Quære,—Whether, inasmuch as Act IX of 1871 is repealed by Act XV

* Appeal from Original Order No. 236 of 1882, Against the order of J. F. Stevens, Esq., Officiating Judge of Sarun, dated the 5th of May 1882.

(1) 17 W. R., 272.

of 1877 and the later Act contains no provision similar to that contained in s. 1 of Act IX of 1871, Act XIV of 1859 can be said to have been repealed in respect of suits instituted before the 1st of April 1873.

Baboo *Chunder Madhub Ghose* and Baboo *Rughoo Nundun Pershad* for the appellant.

Baboo *Anundo Gopal Palit* for the respondents.

THE facts of this case sufficiently appear from the judgments of the Court (MITTER and FIELD, JJ.)

MITTER, J.—This is an appeal against the decision of the District Judge of Sarun, dismissing a petition for execution of decree, dated the 4th August 1870, upon two grounds: (1st), that the application for execution is barred by limitation; and (2ndly), that as regards one of the judgment-debtors, *viz.*, the defendant No. 2, he is liable only to the extent of the property hypothecated in a certain bond executed in favour of the plaintiff, decree-holder, and that that property having been sold he is not any further liable for the balance of the decree. It appears that the application next preceding the one now under our consideration for execution was filed on the 26th September 1877. It was followed by the sale of certain property on the 1st of April 1878. Then it further appears that on the 8th July 1878, the decree-holder deposited Rs. 2 as Nilamee fees, that is, costs of bringing certain property to sale in execution of the decree in question. The present application was made on the 28th of March 1881.

Upon these facts the District Judge was of opinion that, under the Limitation Act of 1877, the present application, having been made more than three years after the application of the 26th September 1877, is barred by limitation. In appeal it is contended that the present Limitation Act does not apply to this case because the decree in question was passed on the 4th of August 1870, when the Limitation Act of 1859 was in force, and in support of this contention the well-known case of *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (1), decided by the Judicial Committee of the Privy Council on the 10th June 1881, has been cited. There is a very essential difference between the facts of the case cited before us and of the present case,—that difference being that in *Mungul Pershad Di-*

(1) L. R., 8 I. A., 123; I. L. R., 8 Calc., 51.

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chit v. *Grija Kant Lahiri* the application for execution, which was under the consideration of the Judicial Committee, was filed when the Limitation Act of 1871 was in force, and the decision of the Privy Council was based upon the provisions of s. 1 of the Limitation Act of 1871. There is no such corresponding provision in the present Limitation Act. It is, therefore, doubtful whether the ruling referred to will apply to a case like the present in which the application for execution was filed after the Limitation Act of 1871 had been repealed; but it is not necessary to decide that question in this case, because it seems to us that, conceding in favour of the judgment-debtors that the present Limitation Act applies to this execution case, we are of opinion that the District Judge was in error in holding that the application of the 28th of March 1881 is barred by limitation. Under Art. 179, Sch. II of the Limitation Act, the decree-holder is entitled to apply for execution within three years from any date when he takes some step in aid of execution of the decree. The deposit of Rs. 2 as Nilamee fees on the 8th July 1878, is certainly a step in aid of execution of the decree, and the application under our consideration, *viz.*, the application of the 23rd March 1881, being within three years from the 8th July 1878, is within time. We are, therefore, of opinion that the District Judge was in error in throwing out the application for execution on the ground that it is barred by limitation. As regards the second ground upon which the District Judge has rejected the application in so far as the defendant No. 2 is concerned, it appears to us that the decree which is sought to be executed made both the defendants *viz.*, the defendant No. 1 and the defendant No. 2, personally liable. The last portion of the decree contains only a declaration of lien upon the property hypothecated for the realization of the amount decreed. That being so, the defendant No. 2 is as much personally liable for the balance of the decree as the defendant No. 1.

We, therefore, reverse the decision of the lower Court, and decree this appeal with costs.

FIELD, J.—Three points have been argued before us in this appeal. The first point relates to the application to this case of the principle laid down in the Privy Council decision of

Mungul Pershad Dichit v. *Grija Kant Lahiri* (1). Now the present case is to be governed by the Limitation Act of 1877, and that Act contains no provision similar to those contained in s. 1, Act IX of 1871. This being so the question arises whether Act XIV of 1859 can be said to have been repealed in respect of suits instituted before the 1st of April 1873. Now it may be argued that s. 2, Act IX of 1871 is a complete and absolute repeal of the Acts therein referred to, and to be found in the first schedule; one of these Acts being Act XIV of 1859, except a portion of s. 15 with which we have no concern, and it may then be contended that the effect of s. 1, Act IX of 1871 was to stay the applicability of the general repeal in respect of the suits in question, that is, suits instituted before the 1st day of April 1873. Then it may be argued that, when Act IX of 1871 was repealed by the present Act XV of 1877, the effect of that repeal was to do away with the stay of the repeal contained in s. 2, Act IX of 1871, and that the immediate result was that the complete and absolute repeal of Act XIV of 1859, which but for s. 1, Act IX of 1871 would have had effect upon the class of suits specified immediately, had that effect and operation which before were stayed or delayed. I agree with my learned colleague that in the present case it is not necessary for us to decide this point. It may perhaps arise hereafter, and other cases and other considerations may be laid before us which may assist us in forming a conclusion. I, therefore, think that it will be better to abstain from a definite determination of a question, the decision of which is not absolutely necessary for the disposal of this case.

The second point is, whether the payment of Rs. 2 as Nilamee fees in July 1878 was, within the meaning of the present law, a step in aid of the execution of the decree. I am of opinion that it was such a step.

The third point relates to the construction of the decree as regards the liability of the defendant No. 2, and in the view taken by my learned colleague upon that point I entirely concur.

Appeal allowed.

(1) L. R., 8. I. A., 123; I. L. R., 8. Calc., 51.

1883
March 7.

Before Mr. Justice Wilson and Mr. Justice Maclean.

SRISHTEEDHUR BISWAS (PLAINTIFF) *v.* MUDAN SIRDAR AND OTHERS (DEFENDANTS).*

Right of occupancy—Ejectment—Transfer—Effect of asserting a right to transfer land, by a ryot having a right of occupancy, who remains in possession.

A ryot having a right of occupancy is not liable to ejectment by his superior landlord merely because he has asserted a transferable right in the lands, and sold that right to a stranger without giving up possession of the land.

Narendra Narain Roy Chowdhry v. *Ishan Chandra Sen* (1); and *Ram Chandra Roy Chowdhry* v. *Bholanath Lushkhur* (2) distinguished.

Dwarka Nath Misser v. *Hurrish Chundra* (3) referred to.

IN this case the principal defendants, Nos. 2, 3, and 4, held a jama under the plaintiff, which they had transferred to the first defendant. The plaintiff sued to eject the defendants, alleging that the jama was not transferable. The only defendant who appeared to the suit was defendant No. 3, and he pleaded that his jama was kaemi, and transferable according to the custom of the country, and that as no notice to quit had been served upon him the suit could not be maintained. The following issues were accordingly framed:—

First.—Whether the suit could proceed, unless notice to quit was served upon the defendants?

Second.—Whether the jama of defendants Nos. 2 to 4 was transferable or not; and whether the sale of the jama by those defendants to defendant No. 1 was void; and whether the plaintiff was entitled to the khas possession of the land by evicting the defendants?

The Court of first instance held with regard to the first issue, on the allegation of the plaintiff, that the defendants Nos. 2 to 4

* Appeal from Appellate Decree No. 1379 of 1881, against the decree of H. Beverley, Esq., Additional Judge of the 24-Pergunnahs, dated the 13th May 1881, modifying the decree of Baboo Roma Nath Seal, First Munsiff of Satkheera, dated the 13th September 1880.

(1) 13 B. L. R., 274: S. C, 22 W R., 22.

(2) 22 W. R, 200.

(3) I. L. R. 4 Calc., 925.

were no longer his tenants, but trespassers along with the first defendant, that no notice to quit was necessary.

With regard to the second issue the Court held, as regards the transferable character of the holding, that the defendants having failed to adduce any evidence, the sale of the jama to the first defendant was void, and that the plaintiff was entitled to khas possession.

The suit was accordingly decreed with costs.

The third defendant then appealed.

The lower Appellate Court, however, found as a fact that the appellant, with others, being tenants with certain occupancy rights under the plaintiff, had transferred their rights to the first defendant, from whom they again took a sub-lease, and so remained throughout in possession, and that consequently the only question at issue, and the only one that was urged in appeal, was whether the transfer having been set aside as invalid, the plaintiff could eject his former tenants.

In the plaint there was also an allegation that the tenants had denied the plaintiff's title, but this allegation was traversed, and no evidence was given in support of it, and in the lower Appellate Court the plaintiff's right to eject was based solely on the attempt, on the part of the tenants, to transfer their rights.

The lower Appellate Court held that this was not a sufficient ground to entitle the plaintiff to eject them and obtain khas possession, and accordingly varied the decree of the Court below by declaring that the tenure in question was not transferable, and disallowing the prayer of the plaintiff for ejectment of the defendants Nos. 2 to 4.

Against this decree the plaintiff now preferred a special appeal to the High Court, on the ground that the lower Court was wrong in holding that the defendants Nos. 2 to 4 could occupy the land after they had sold their right of occupancy to the defendant No. 1: that the third defendant having admitted, in his written statement and also in his deposition, that the tenants had sold their occupancy right and made over possession to defendant No. 1, and that they were not holding possession under the plaintiff on their occupancy right, but had completely severed their con-

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nection with the landlord, the lower Appellate Court should not have disturbed the decree of the first Court for ejectment. It was contended, in support of this view, that the case was within the ruling in the case of *Narendra Narain Roy Chowdhry* v. *Ishan Chundra Sen* (1).

Baboo *Umbica Churn Bose* appeared on behalf of the appellant.

Baboo *Boydo Nath Dutt* for the respondents.

The judgment of the Court (WILSON and MACLEAN, JJ.) was delivered by

WILSON, J.—The question for decision here is, shortly, whether occupant cultivators who have asserted a transferable right in their lands and sold that right to a stranger without giving up their occupation, are liable to ejectment by the superior landlord, whom they may have repudiated in a suit brought against them for arrears of rent, and set themselves up as tenants of the purchaser.

Fortunately this question has been considered on several occasions by this Court.

In *Narendra Narain Roy Chowdhry* v. *Ishan Chandra Sen* (1), it was ruled that the transferee of occupant rights, illegally sold, could be ejected if he had entered into actual possession of the land. The principle involved in that case was the abandonment by the tenant of his connection with the land, and the landlord's consequent right to re-enter. This principle is re-asserted in *Ram Chunder Roy Chowdhry* v. *Bholanath Lushkur* (2), and is also referred to in a recent judgment delivered on 17th January 1883 (appeal from Appellate Decree No. 1655 of 1881, Mitter and O'Kinealy, JJ.)

In *Dwarka Nath Misser* v. *Hurrish Chandra* (3) there is a remark which seems to indicate that occupant ryots who after sale remain upon the land by permission of the transferee, as his tenants, do so under circumstances amounting to an abandonment of their right of occupancy, and the result of that case shows that neither they nor the transferee can resist an

(1) 13 B L R, 274 S C, 22 W. R, 22.
(2) 22 W R, 200
(3) I L R, 4 Calc, 925.

action to eject them; but it must be remarked that in that case the ryots did not question the decree for their ejectment by appeal to this Court, and therefore we need not consider the judgment as deciding anything contrary to the other cases quoted above.

We accordingly follow those decisions and dismiss this appeal with costs.

Appeal dismissed.

Before Mr. Justice Wilson and Mr. Justice Maclean.

CALLY NATH BUNDOPADHYA (PLAINTIFF) *v.* KOONJO BEHARY SHAHA AND OTHERS (DEFENDANTS).*

1883, *March 7.*

Mortgage—Money Decree on Mortgage Bond—Mortgagee's lien—Registration Act (XX of 1866,) s. 53—Frame of Suit—Parties.

A and *B*, co-mortgagees, obtained a summary decree under the Registration Act XX of 1866, s. 53, on the 6th May 1868, in respect of certain property which was again mortgaged by the owner to *C* and *D* in March 1869. *C* and *D* having also obtained a decree on their mortgage brought the property to sale in execution of their decree and purchased it themselves in December 1874.

A not having had the whole of his mortgage debt satisfied instituted a suit on the 13th December 1879 against *C* and *D*, and the representatives of *B* (*B* having meanwhile died and his representatives not joining in the suit), to enforce his lien against the mortgaged property in the hands of *C* and *D*, and to recover the share of the mortgage debt still due to himself alone.

Held, that *A* did not acquire a better right to proceed against the property by reason of its having come into the hands of *C* and *D*, nor did *C* and *D* take subject to a greater burden than the mortgagor himself, and that as *A* had allowed his decree against the mortgagor to be barred by limitation, he had lost all right to proceed against the property by execution were it in the hands of the mortgagor, and consequently he could not be allowed to proceed against it by suit, merely because it was in the hands of third parties.

Quære.—Whether the suit being one for only a portion of the debt due on the mortgage (*B's* representatives not having joined and claimed the share due to them) was not properly framed, assuming it would lie.

* Appeal from Appellate Decree No. 1484 of 1881, against the decree of F. McLaughlin, Esq., Judge of Backergunge, dated the 28th May 1881, affirming the decree of Baboo Bani Madhub Mitter, First Subordinate Judge of that district, dated the 24th April 1880.

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Syud Emam Momtazooddeen Mahomed v. *Raj Coomar Dass* (1); and *Jonmenjoy Mullick* v. *Dossmoney Dossee* (2) referred to.

THE plaintiff in this suit, instituted on the 13th December 1879, sought to have his right to a prior lien on certain properties declared, and to obtain the amount due to him upon a mortgage-bond by the sale of those properties.

He alleged in his plaint that one Koylash Nath Bhuttacharji borrowed Rs. 1,500 from him and a like sum from Jugul Kishore Gupta, the father of the defendants 4 and 5, on a mortgage-bond, dated the 4th Pous 1273 (18th December 1866); that he and Jugul Kishore Gupta obtained a decree against Koylash Nath Bhuttacharji under Act XX of 1866 on the 6th May 1868; that a part of the mortgaged property lying within the jurisdiction of the Dacca Court was sold under it, and that he and his co-mortgagee then brought a suit in the Second Subordinate Judge's Court at Backergunge against the mortgagor to establish their lien over the properties in dispute, and obtained a decree on the 13th September 1873; that subsequently to the mortgage in favor of himself and Jugul Kishore, Koylash Nath Bhuttacharji again mortgaged the properties to the defendants Nos. 1 and 2 on the 24th Falgoon 1275 (6th March 1869); that the defendants Nos. 1 and 2 instituted a suit on their mortgage against Koylash Nath Bhuttacharji, and obtained a decree on the 12th July 1870, and in execution of that decree brought the disputed properties to sale on the 3rd December 1874 and purchased them themselves in the name of defendant No. 3; that in the meantime the plaintiff had brought the properties to sale under his decree, and they were purchased by his wife, Nityakali Dabi, on the 3rd February 1875, but on her trying to get possession she was resisted by the defendants Nos. 1 and 2; that she thereupon instituted a suit to obtain possession, but being unsuccessful in such suit the plaintiff had to return her the purchase-money. The plaintiff, therefore, now brought the present suit to have his right to a lien over the disputed properties declared, and to obtain the amount of the debt due to him satisfied by the sale of those properties, and he joined the defendants Nos. 4 and 5, who were

(1) 14 B. L R, 408: S. C, 23 W R., 187.

(2) I. L. R., 7 Calc., 714: S. C, 9 C. L. R., 353.

the representatives of their deceased father, Jugul Kishore, his co-mortgagee.

The defendants pleaded, amongst other things, that the suit would not lie for want of parties, inasmuch as the representatives of the co-mortgagee had not been made plaintiffs, and that the plaintiff had only sued for his share of the mortgage-debt; that the plaintiff having once obtained a decree for the recovery of the money due on the mortgage bond, a second suit to recover the money and enforce his lien would not lie; and that the suit was barred by limitation and also under s. 13 of Act X of 1877.

The Court of first instance held that the plaintiff having once taken a money-decree upon the mortgage, under s. 53 of Act XX of 1866, could not again obtain a decree for the money due on the mortgage; that the debt due to the plaintiff on the mortgage had been changed from a contract-debt into a judgment-debt, and that he could therefore only sue to establish his right to sell the mortgaged properties for the satisfaction of the judgment-debt due to him; and that as the decree which the plaintiff had obtained under Act XX of 1866 was barred by limitation and the debt had ceased to exist, the plaintiff had no cause of action.

The Court also found that the suit being brought to enforce the payment of only a part of the mortgage-debt, it was badly framed and would not lie, and that the plaintiff, instead of suing only for his share of the debt, should have sued for the whole debt, and if his co-mortgagee, or in this case the representatives of his co-mortgagee, declined to join in the suit, he should have made them co-defendants and asked that the Court should make them co-plaintiffs in the suit.

The suit was accordingly dismissed with costs.

The lower Appellate Court, on appeal, confirmed the decree of the Court of first instance both on the ground that a suit for only a portion of a mortgage-debt would not lie, and also on the ground that the plaintiff had exhausted his remedies in the former suit and consequently could not maintain the present suit.

Against this decree the plaintiff now preferred a special appeal to the High Court.

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Baboo *Rash Behary Ghose* appeared on behalf of the appellant.

Baboo *Durga Mohun Dass* for the respondents.

The judgment of the Court (WILSON and MACLEAN, JJ.) was delivered by

WILSON, J.—The facts found in this case are as follows :—

The disputed property was mortgaged to the plaintiff and the father of defendants 4 and 5 in Pous 1273 (December 1866). They obtained a summary decree under the the Registration Act XX of 1866 in May 1868.

The property was again mortgaged to defendants 1 and 2 in March 1869. They sued on their mortgage bond, obtained a decree, sold the property in execution, and bought it themselves in December 1874.

The plaintiff now sues the first and second defendants to enforce his share of the mortgage-debt against the property in their hands, joining the fourth and fifth defendants as the representatives of his co-mortgagee.

The District Judge affirming the Munsiff has dismissed the suit on two grounds:

First, he has held that the plaintiff's suit is improperly framed, and that he cannot sue for his share of the mortgage-debt. We think it very doubtful whether, on the construction of the mortgage-deed, this is so, whether the transaction was not several rather than joint, but it is not necessary to decide this.

The District Judge has held, secondly, that the plaintiff had exhausted his remedies in the former suit, and cannot sue again. This proposition is, we think, too broadly stated. The law applicable to the matter depends upon the effect of two Full Bench decisions, both of which are binding upon us.

In *Syud Emam Momtazooddeen Mahomed* v. *Raj Coomar Dass* (1), a mortgagee, who had obtained a summary decree under the Registration Act XX of 1866, afterwards brought a suit to enforce his lien upon the mortgaged property in the hands of the mortgagor. The Court, having pointed out

(1) I. L. R., 7 Calc., 714. S. C., 9 C. L. R., 353.

that the effect of the summary decree was the same as that of a money-decree in an ordinary mortgage-suit, held that the plaintiff had not, by obtaining a personal decree, forfeited his lien upon the land, but that he must enforce it in execution, and could not maintain a suit for the purpose.

In *Jonmenjoy Mullick* v. *Dossmoney Dossee* (1), the plaintiff had obtained a money-decree against his mortgagor. After the decree the mortgagor sold the mortgaged property, and it was held that the plaintiff might enforce his lien by suit against the property in the hands of the purchasers.

These two cases establish that there is a difference in the procedure applicable between the case where the property is still in the hands of the mortgagor and the case where it has passed to a purchaser, the lien being enforcible in the one case by execution, in the other by suit.

But we do not see how the right can be more extensive in the one case than in the other.

It would be contrary to ordinary principles, we think, to hold that the mortgagee acquires a greater right by reason of the mortgagor's alienation, and that the purchaser takes subject to a greater burden than the debtor himself.

In the present case, the plaintiff has allowed his decree against the debtor to be long since barred by limitation, and has therefore lost all right to proceed by execution against the property in the hands of his debtor. We think he has no better right to proceed by suit against the property in the hands of the purchaser.

The appeal is dismissed with costs.

Appeal dismissed.

(1) I. L. R., 7 Calc., 714 S. C. 9 C. L. R., 353.

PRIVY COUNCIL.

P. C.*
1882
November 24

MACNAGHTEN AND ANOTHER (JUDGMENT-CREDITORS) *v.* MAHABIR PERSHAD SINGH AND ANOTHER (JUDGMENT-DEBTORS.)

[On appeal from the High Court at Fort William in Bengal.]

Sale in execution of decree—Civil Procedure Code (Act X of 1877), *s.* 311—*Irregularity in publication of intended sale*

An objection to the validity of a sale of revenue-paying land, on the ground that the revenue assessed upon it had not been stated in the proclamation of the intended sale, in accordance with s. 287 of Act X of 1877, was taken, for the first time, in the Court of appeal; an application to set aside the sale, on the ground that it had taken place without proclamation made, having been rejected by the Court of the first instance, which found that proclamation had been made.

Held, that the objection was taken too late, although, if properly taken in the Court of first instance, it would have been good to the extent that not stating the amount of the revenue was an irregularity; substantial damage, resulting from it, remaining to be proved, as required by s 311 of Act X of 1877.

Held, also, that inadequacy of price having been alleged as substantial damage, without having been proved to be the effect of the non-statement of the revenue, the applicant had not (as required by s. 311) proved, to the satisfaction of the Court, that he had sustained substantial damage by reason of such irregularity.

APPEAL from a decree (22nd April 1881) of the High Court reversing a decree (25th September 1880) of the Officiating Subordinate Judge of Zillah Tirhoot.

This appeal arose out of an order made by the High Court in its Appellate Jurisdiction in reference to the sale of fourteen villages in the Tirhoot District, in execution of a decree which had been obtained by the appellants against the respondents. In 1879 on two separate dates, 15th September and 20th November, the right, title, and interest of the respondents in twenty villages in that district were sold in execution, and purchased by the appellants, leave having been granted to them to bid at the sales. The respondents afterwards applied to have the sales set aside, on the ground that

* *Present*. LORD FITZGERALD, SIR B PEACOCK, SIR R. COUCH, and SIR A. HOBHOUSE.

the villages had been sold at an inadequate price, attachment processes not having been executed, and the sale proclamation not having been published in the villages.

This application having been rejected by the Subordinate Judge, who found that the sale proclamations had been published, the High Court (MITTER and MACLEAN, JJ.) on appeal, while maintaining the finding of the lower Court as to the fact of the proclamations having taken place, reversed its decision, and set aside the sale.

The High Court afterwards, on the 19th September 1881, reviewed its judgment as to six of the villages.

The judgment (22nd April 1881) on appeal was as follows :—

"The application was made on the ground that a property of a very large value was sold at a grossly inadequate price, attachment processes and sale proclamations not having been duly executed and published in the villages. Upon both these points the lower Court has found against the appellants. As regards the adequacy or otherwise of the value, the finding is manifestly against the weight of the evidence. Of the 20 villages sold, 19 were let in ticca by two leases in favour of the respondents. The net rent payable annually, under the two leases, was Rs. 4,172 and odd. The leases also cover 20 villages, one of which has not been sold. There is evidence to shew that the twentieth village sold, and which is not covered by the lease, is of comparatively more value than the unsold village of the lease. Therefore, upon the evidence, it may be safely taken that the villages sold yielded annually a little over Rs. 4,172. The lower Court remarks that the appellants adduced no evidence to show what is the general rate of value of landed property in the district. It is true that no direct evidence has been given upon that point; but instances in which property has been sold in the district, at not less than 20 years' purchase, have been proved. Calculating at that rate, it is clear that the villages sold are worth about Rs. 60,000.

"Upon the question, whether the sale proclamations were duly published, we do not think that the finding of the lower Court is wrong; but it may be reasonably supposed that the non-specification of the Government revenue in the sale pro-

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clamations published is one of the causes which caused the diminution in the price. Such a mistake or omission is an irregularity contemplated by s. 311 of the Civil Procedure Code—*Girdhari Singh* v. *Hurdeo Narain* (1). It is true that this irregularity was not made one of the grounds of the appellant's application in the lower Court, but it is patent upon the face of the proceedings.

"We therefore reverse the decision of the lower Court and set aside the sale of the mouzahs in question."

In review of the above the judgment was as follows :—

"The judgment of this Court proceeded upon the ground that the Government revenue of the mouzahs sold (the auction-sale of which was sought to be set aside) was not specified in the sale proclamation, and we were of opinion that that was such an irregularity as really affected the prices which those mouzahs fetched at the auction-sale. We further found that the prices which were paid by the petitioners, who were the purchasers and decree-holders, were inadequate.

"It is contended on behalf of the petitioners now before us, that in respect of six mouzahs, namely, Badwa, Bazitpur, Sarsawa, Shafipur, Jahangira and Arazi Gungbarar Hardaspur, the ground upon which the judgment of this Court proceeds is not applicable, inasmuch as the Government revenue of these six mouzahs was specified in the sale proclamation. It is admitted now by the learned pleader, who appears on behalf of the judgment-debtors, that in respect of these mouzahs the Government revenue was specified in the sale proclamation; but he contends that in stating the revenue of Bazitpur, instead of putting Rs. 547 odd annas, which is the correct amount, the amount mentioned in the sale proclamation of that mouzah was Rs. 500, and a similar mistake is pointed out in respect of Jahangira, the correct amount being Rs. 335-7-9, and the amount mentioned in the sale proclamation having been Rs. 345. It is not denied that in respect of the other mouzahs, the Government revenue was correctly specified. Therefore, as regards those four mouzahs, our order is not right and must be set aside. With reference to Bazitpur and Jahangira, the mistakes are so trivial and unimpor-

(1) L. R., 3 I. A., 230

tant that we do not think that they in any way affected the prices of those mouzahs.

"We are, therefore, of opinion that in respect of all these six mouzahs, our judgment is not right; and we accordingly amend it, by directing that the appeal of the judgment-debtors, in respect of these six mouzahs, should be dismissed. In all other respects our judgment will stand."

On this appeal Mr. *Macnaghten, Q.C.*, and Mr. *J. T. Woodroffe* appeared for the appellants.

It was argued for the appellants that the omission to state the revenue assessed on the villages, described in the proclamations of the intended sales, was not a fatal irregularity; because it had not been shewn to have caused substantial injury to the applicant. The burden of showing such injury was upon him; also, the objection could not be effectively taken for the first time in the Court of appeal, which was not in a position to find this substantial injury. The Appellate Court had attempted to find it in the inadequacy of price; but that inadequacy had not been connected with the irregularity, as effect with cause; nor was there any recorded evidence on which the Appellate Court could have arrived at this result. Moreover, the omission to state the revenue having taken place, in regard to some, but not in regard to all, of the villages, (as appeared from the review,) while inadequacy of price was taken to have resulted in reference to all, that general inadequacy, if occasioned at all, appeared not to be traceable to the omission. *Girdhari Singh* v. *Hurdeo Narain Singh* (1) was cited.

The respondents did not appear.

Their Lordships' judgment was delivered by

SIR B. PEACOCK.—This was an application to set aside a sale of certain property in execution of a decree in consequence of irregularity. The application was made under s. 311 of the Civil Procedure Code of 1877, chap. X. By that section it is enacted that "the decree-holder or any person whose immovable property has been sold under this chapter may apply

(1) L. R., 3 I. A., 230.

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to the Court to set aside the sale on the ground of a material irregularity in publishing or conducting it; but no sale shall be set aside on the ground of irregularity unless the applicant proves to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity." Irregularity, therefore, alone is not a ground for setting aside a sale. There must be some substantial injury in consequence of the irregularity, and that must be proved by the applicant. It has also been held that inadequate price of itself is not a sufficient ground for setting aside a sale, unless there is irregularity. The question, therefore, in this case is whether an irregularity did occur, and, if so, whether that irregularity caused injury to the applicant; the injury complained of being the inadequacy of the price which was realised at the sale. The principal irregularity complained of was that no notification of the sale was properly published. Section 286 of the same Code provides that "sales in execution of decrees shall be conducted by an officer of the Court, or by any other person whom the Court may appoint, and, except as provided in s. 296, shall be made by public auction in manner hereinafter mentioned." Then s. 287 says: "When any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court. Such proclamation shall state the time and place of sale, and shall specify as fairly and accurately as possible the property to be sold; the revenue assessed upon the estate, or part of the estate, when the property to be sold is an interest in an estate, or a part of an estate paying revenue to the Government;" and certain other things.

In addition to the irregularity as regards the notification of the sale, another alleged irregularity was complained of, *viz.*, that the attachment was not properly notified. Whether the notice of attachment not having been properly published would affect the sale, or be an irregularity in conducting the sale, it is not necessary to inquire, inasmuch as that point was given up by the applicant on the trial before the Judge. The question then is solely in respect of the alleged irregularity in the proclamation of the sale. The applicant contended that the proclamation

had not been published. He did not contend that in the proclamation the particulars were not properly described as required by the Act. He said in effect that no proclamation had been published. The parties went down to trial upon that point, evidence was given, and the learned Judge of the first Court held that the proclamation had been published, and the High Court affirmed the decision of the first Judge in that respect. There are, therefore, two concurrent findings of the Courts that a proclamation was published.

The Judge consequently refused to set aside the sale. The parties appealed to the High Court. They never took any objection in their grounds of appeal to the form of the proclamation, or stated that there was an irregularity in not having stated all that was required by the Act, and, amongst other things, the revenue which was assessed upon the estate. When the case came before the High Court it was discovered that in the proclamations which were published the amount of revenue had not been stated, and the High Court at that time considered that all the proclamations were alike, and that in each of the proclamations with regard to the 20 mouzahs which were sold the amount of revenue had not been stated. It may be inferred from the grounds of review that the Court themselves first took the point; but whether it was taken by the Court or by the applicant is immaterial, because their Lordships are of opinion that the objection could not be taken for the first time in the Court of Appeal. Even if the objection could have been properly taken at that stage of the proceedings, if no question was raised before the lower Court as to whether any injury had been sustained by the applicant by reason of the proclamations not stating the amount of revenue, that question was never tried in the lower Court, and no evidence had been given with reference to it.

The objection, if it had been properly taken in the first instance, would have been good to this extent, that not stating the amount of revenue was an irregularity; but even then there would have been something more to be proved than the mere irregularity,—it would have been necessary to go on and show that substantial damage had been sustained by the applicant in consequence of that irregularity. No evidence was given upon that subject

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before the lower Court, though by s. 311 the onus lay upon the applicant to prove, to the satisfaction of the Court, that he had sustained substantial damage in consequence of the irregularity; nor was there any finding of the lower Court upon it, because the question was never raised.

The High Court, having held that the non-statement of the amount of revenue in the proclamation was an irregularity, proceeded to try the question whether the irregularity had caused substantial injury to the applicant. They say: "But it may be reasonably supposed that the non-specification of the Government revenue in the sale proclamations published is one of the causes which caused the diminution in the price." There was no evidence at all on the subject. It appears to their Lordships that the High Court could not, without evidence and upon a mere supposition, properly find that the non-statement of the revenue in the proclamation did cause an injury to the applicant by causing an inadequate price to be bid at the sale.

The High Court, however, upon the ground that there was an irregularity, and that it had caused substantial injury to the applicant, reversed the decision of the lower Court. Upon that a review was applied for, and then it was discovered that the objection as to the non-statement of the revenue did not apply to six of the mouzahs and six of the sales; and the High Court, having found that the proclamation in respect of those six did contain the amount of the revenue, set aside their former decision as to them, and upheld it as to the other fourteen. But when they upheld the sale as to the six they never adverted to the fact that, as they had fallen into a mistake as to them, they might equally have fallen into a mistake as to the other fourteen. They found that the inadequacy of price as regards the six did not arise from the non-statement of the amount of revenue. They might, therefore, have reasonably supposed that their former supposition, that the inadequacy of price as to the fourteen was occasioned by the non-statement in the notice of sale of the amount of revenue, was as much without foundation as it was as to the six; but instead of that they upheld their decision as to the fourteen, and set it aside as regarded the six. The question now is whether the judgment of the High Court as regards the four-

teen is correct in holding that there was an irregularity in the non-statement of the amount of revenue in the proclamation which could be relied on upon appeal, and that the appellant had sustained substantial injury by reason of that irregularity.

Their Lordships think that it was too late for the applicant to make the objection; and even if it were not too late for him to make the objection before the High Court, there was no evidence to justify the High Court in arriving at the conclusion that there was inadequacy of price occasioned by the non-statement of the revenue in the sale proclamation.

Under these circumstances, their Lordships will humbly advise Her Majesty to reverse the decision of the High Court, and to affirm the decision of the first Judge. They think that the respondents must pay the costs of this appeal and the costs in the High Court.

Appeal allowed.

Solicitors for the appellants: Messrs. *Lawford, Waterhouse* and *Lawford.*

FULL BENCH REFERENCE.

Before Sir Richard Garth, Knight, Chief Justice, Mr. Justice Mitter, Mr. Justice McDonell, Mr. Justice Prinsep, and Mr. Justice Wilson.

RUDRA KANT SURMA SIRCAR AND OTHERS (DEFENDANTS) *v.* NOBO KISHORE SURMA BISWAS (PLAINTIFF).

1883 *March 9.*

SAMOD ALI, DEFENDANT *v* MAHOMED KASSIM AND OTHERS (PLAINTIFFS)*

Limitation (Act XV of 1877), s. 7—Minority—Right to Sue—Personal exemption—Assignment by Minor.

Under s. 7 of the Limitation Act, a minor has, in respect of a cause of action accruing during his minority, a right to sue at any time within three years of attaining his majority; but if during his minority, or if after attaining his majority and within three years thereof, such person assigns all his right and interests to a third party, who is *sui juris*, the latter cannot claim the exemptions accorded to the minor by s. 7 of the

* Full Bench Reference made by Mr. Justice Wilson and Mr. Justice Field, dated the 6th September 1882, in appeals from Appellate Decrees Nos. 434 and 1927 of 1881.

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Limitation Act, but is subject to the ordinary law of limitation, governing suits in which relief of the same nature is claimed.

THESE cases were referred to a Full Bench by Wilson and Field, JJ., on the 6th of September. In addition to the facts stated it may be noticed that in No. 434 of 1881 the sale to the plaintiff was a private sale, and the vendor Rajoni Nath Chuckerbutty was made a party-defendant to the suit. In No. 1927 of 1881 the sale to the plaintiffs was made in execution of a money decree against the minors In this suit also the minors were made defendants.

The reference in both cases was as follows :—

"*No.* 434 *of* 1881.—The question raised upon this appeal is a very short one, but it is important.

"Rajoni Nath Chuckerbutty, a minor, was entitled to the lands in suit. During his minority he was dispossessed. On attaining his majority, he assigned his interest to the plaintiff, and this suit was brought within three years of Rajoni Nath's coming of age, but more than twelve years after the dispossession. The question is whether the suit is barred by limitation.

"Had the question been wholly a new one, we should have been prepared to hold that it is not. By s. 7 of the Limitation Act (XV of 1877): 'If a person entitled to institute a suit...be, at the time from which the period of limitation is to be reckoned, a minor...he may institute the suit within the same period after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor." "Nothing in this section... shall be deemed to extend for more than three years from the cessation of the disability...the period within which any suit must be instituted.'

"By s. 29, 'at the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished.'

"At the time when Rajoni Nath came of age, he had a good title to his property and a valid right to sue for it, which right of suit had three years still to run. We do not see why this right of property, with the right of suit incident to it, should not be assignable as other such rights are.

"If this view be not correct, and the right to sue after attaining

majority is limited to the person attaining majority, very incongruous results might follow. For example, if he died the day after he came of age, his right of suit, and, with it, his right of property must die with him: his representatives could not sue. Whereas if he died the day before coming of age, his representatives would have three years to sue.

"It was argued before us that the express mention in s. 7 of the right of the representatives to sue in case of death during disability, supported the view that the representatives took no benefit in any other case. But that does not seem to us sound reasoning. In the case of death under disability, it was necessary to prescribe a *new point of time* from which limitation was to run. And therefore special mention of the case was necessary.

"We were, however, referred to a case of *Mahomed Arsud Chowdhry* v. *Yakoob Ally* (1), in which Markby and Morris, JJ., took a different view of the construction of s. 7 of Act IX of 1871, holding that the privilege given to the person, who was under disability, was limited to himself personally and did not extend to his assignee.

"It is true that that case was decided upon an Act different from that now in force; but we are unable to find any material difference between the one Act and the other, so far as the present question is concerned. We, therefore, think it right to refer to a Full Bench the question whether this suit is barred by limitation.

"*No.* 1927 *of* 1881.—This case gives rise to a question very similar to one which we have already referred to a Full Bench in another case (No. 434 of 1881), with reference to s. 7 of the Limitation Act.

"In that case an infant attained his full age and then assigned his interest, and the assignee sued within three years of his assignor's majority.

"In this case the infants' interest was assigned while they were under age, and they have not attained majority. The assignee has sued within three years of the assignment.

It appears to us that the two cases must be decided upon the

(1) 15 B. L. R., 357.

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same principle; but as there is this difference between them, we think it right to refer this case also to the Full Bench.

Baboo *Grish Chunder Chowdhry* for the appellants in No. 434.

Baboo *Guru Dass Banerjee* and Baboo *Harendra Nath Mukerjee* for the respondent.

Baboo *Rash Behary Ghose* and Baboo *Aukil Chunder Sen* for the appellant in No. 1927.

Baboo *Sree Nath Banerjee* for the respondents.

The following judgments were delivered by the Full Bench.

No. 434 *of* 1881.

GARTH, C.J.—I think that the question referred to us should be answered in the affirmative.

It seems to me that the provisions in the Limitation Acts, which relieve minors and others under disability from the rules which are binding upon other people, *are purely personal exemptions,* and must be considered as attaching to the person only, and not to the property, or the title, of those who are under disability.

The only reason, I conceive, why such persons are not subjected to the ordinary rules of limitation, is that the law considers them incapable of forming a proper judgment as to bringing suits, or otherwise managing their own affairs.

But this reason does not apply to the property of such persons, or the titles by which they hold it; nor does there seem to be any good ground why the protection thus afforded to them should be extended to purchasers from them.

It may perhaps seem rather hard, that in a case like the present, a man purchasing property from a minor, which is not in the minor's possession, should at once be disabled from bringing a suit to recover it; but after all, this is only one of those difficulties, against which purchasers, if properly advised, can easily protect themselves. In this particular instance, the plaintiff, instead of taking from the minor an absolute transfer of property, which was not in his possession, might have entered into a contract for purchase, to be completed when the property had been recovered by suit.

But, on the other hand, if the law were, as the plaintiff contends, that a purchaser when he buys property from a person under disability buys the exemption from limitation along with it, anomalies without end would be the consequence.

Thus a minor of three years old, who had been out of possession of property for two years, might transfer it to a person of full age. The purchaser, if the minor were an Englishman, would then have 18 years within which to bring his suit, although during all that time he would be under no disability and perfectly capable of managing his own affairs.

Again, a purchaser buying the estate of a lunatic, who continued to be a lunatic for 60 or 70 years after the sale, would, during the whole of that period, be freed from the law of limitation; and the person in possession of the property might, after the lapse of 60 or 70 years, be sued by the purchaser, or his heirs, who had no excuse during all that time for sleeping upon his rights.

I entirely agree with the learned Judges who decided the case of *Mahomed Arsud Chowdhry* v. *Yakoob Ally*, (1) with regard to the proper construction of s. 7 of the Limitation Act of 1871; and I think also, that the fact of the minor's representative in interest being expressly allowed by that section a certain time for bringing his suit, *in those cases where the minor dies during the disability*, seems clearly to indicate the intention of the Legislature, that in other cases the assignee of a minor is to have no special privilege.

But apart from what I consider to be the meaning and the reason of the Limitation Act, I think an extremely strong argument against the plaintiff's contention arises from the fact, that our attention was not called to a single authority (except the case just cited), in which any attempt has been made to extend the exemption which is given to persons under disability to purchasers from those persons. If there had been any ground for the plaintiff's contention, we should have expected points of doubt and difficulty to have constantly arisen from such a state of the law.

I think, therefore, that this appeal should be allowed; that the

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decision of the lower Appellate Court should be reversed, and the judgment of the Munsiff restored; and I also think that the defendant should have his costs in all the Courts.

No. 1927 *of* 1881.

I think that this case must be governed by the same principle as the other; and that consequently the judgments of the lower Courts should be set aside, and the plaintiff's suit dismissed with costs in all the Courts.

MITTER, J.—I am also of opinion that the question referred to us should be answered in the affirmative.

The express mention of the legal representatives in the third paragraph of s. 7 clearly indicates that the representatives in any other case do not take any benefit under it. But it has been said that the express mention of the legal representatives was made, because in the case of death under disability, it was necessary to prescribe a new point of time from which limitation was to run. But suppose the property of a person, who was under disability at the time when he became entitled to institute a suit in respect of it, be sold, and after the sale he dies, the provisions of the third paragraph of s. 7 would not apply to the purchaser. This being so, if the provisions of s. 7 would apply at all to the purchaser, his case must come under the first paragraph of the section qualified by the proviso.

But the language of the first paragraph cannot be made applicable to a case like the one supposed. It provides that the suit may be instituted within the same period after the disability has ceased as would otherwise have been allowed. But in the case supposed there could not be any *cessation of disability*, because the death took place when the disability was continuing.

It has been suggested that the disability in the section means the disability to sue, and it may be reasonably considered to have ceased on the sale of the property in respect of which the person under disability is entitled to bring a suit; and therefore in the case of a sale the time would run, under the first paragraph of the section, from the date of the sale.

But it seems to me that this construction is not borne out by the language used by the Legislature. The section speaks

of the cessation of the disability, *i.e.*, the disability of the person who was entitled to the property. By the sale of the property his disability does not come to an end. The *ability* of the purchaser to institute the suit is not the same thing as the cessation of the disability of the person whose property is sold. Then, again, suppose the person on whose behalf the property is purchased is himself a minor, or insane, or an idiot, the date of the sale in that case could not reasonably be considered as the cessation of the disability. It would be almost impossible to apply the language of paragraph 1 of the section to a case like that.

I entirely agree with the learned Judges who decided the case of *Mahomed Arsud Chowdhry* v. *Yakoob Ally* (1), in thinking that the privilege under s. 7 is purely a personal one. It has been said that this construction leads to anomalous results; because there may be cases in which the right in a particular property may be still vested in a minor, or insane, or an idiot, and yet such right would not be saleable. There is no incongruity in this, because the privilege granted is to the minor, insane, or the idiot himself, but not to a stranger, who may choose to become a purchaser. Then as to the creditors of such persons, they cannot complain of any hardship, because they cannot reasonably claim any higher rights than they could have claimed if their debtors had not been under any disability. Then again the existence of a right does not carry with it, necessarily, the power of alienation of such right. For example, the right to recover a contract debt is not extinguished after the lapse of the period of limitation prescribed for enforcing it (see s. 28 of the Limitation Act), still it is not alienable after the lapse of that time in the same sense in which the right of a minor, insane, or an idiot in a particular property, movable or immovable, in respect of which he is entitled to bring a suit is not alienable after the lapse of the ordinary period of limitation.

On the other hand, any other construction of the section would lead to incongruous results. For example, the case of a purchaser buying the estate of a lunatic, which has been

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put as an illustration by my Lord the Chief Justice, shows how inconvenient it would be if the construction put by the lower Appellate Court be adopted.

McDONELL, J.—I would answer in both these cases the question referred to us in the affirmative, and generally for the reasons given by the Chief Justice and Mr. Justice Mitter.

PRINSEP, J.—I agree in holding that under the terms of s. 7 of the Limitation Act XV of 1877, the privilege conferred is personal to minors, insanes, or idiots, and cannot be transferred *inter vivos*. I am not prepared to say whether this was intentional, or is due to an oversight on the part of the Legislature.

WILSON, J.—The questions raised in these cases are, to my mind, questions of considerable difficulty. I have felt grave doubts as to how they ought to be answered, and those doubts have not been removed. I agree that the construction placed upon the Act by the majority of the Court is one which it may fairly bear; but it involves serious anomalies and inconveniences. Thus, as appears from the first of the cases referred, a person who has just come of age may have property, and yet be practically unable to sell or dispose of it in any way. It appears from the second case that the same person, whether still under age or not, may have property, and the right to sue for it at any time for years to come; but that the property is wholly out of reach of his creditors.

If it be said that the difficulty may be removed by the purchaser's obtaining a power-of-attorney to sue in his vendor's name, there seem to be several answers. That is a mode of procedure not in ordinary use in this country. It would not be available for a purchaser in execution; and if it were, an infant cannot give a power-of-attorney. And if the infant did sell after he came of age with a power-of-attorney, the right of the purchaser would still be wholly dependent upon the life of his vendor. If the vendor died before suit, no suit could be brought. If he died pending the suit, it could not be revived, for the cause of action would not survive.

I am by no means sure that another construction of the Act is not equally legitimate, and one which would remove many of these anomalies. I am by no means sure that we ought not to hold that the person who is or has been under disability, having in him a right of property and a right to sue for that property, has a right to assign both, not because there are any words in the Act making them assignable, for there are none, but because property is by the general law ordinarily assignable, and, with it, the right of suit for its recovery. If we were so to hold and also to hold, as I think we well might, that an alienation of an infant's estate is, so far as that estate is concerned, a termination of the disability, we should, I think, get rid of most of the difficulties of the subject. The result would be, that a purchaser of an infant's estate, who purchased after the ordinary period for limitation had passed, would have three years from his purchase within which to sue; and a purchaser from one who had attained his full age would have three years from the date of majority.

I do not dissent from the judgment of the majority, but I feel great doubt about the matter.

APPELLATE CIVIL.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Field.

JUDOONATH GHOSE (PLAINTIFF) *v* SCHOENE KILBURN & CO. (DEFENDANTS.*)

1883 *March* 15.

Landlord and Tenant—Dur-maurasi mokurari Tenure—Notice of Relinquishment—Surrender of Lease.

A tenure under a dur-maurasi mokurari lease of land, which is not [illegible] for agricultural purposes, cannot be put an end to by a mere relinquishment, on the part of the lessee, although after notice to the landlord.

Per FIELD, J.—The principle laid down in the case of *Heera Lall Pal* v.

* Appeal from Appellate Decree, No. 1866 of 1881, against the decree of Baboo Kedareshur Roy, Subordinate Judge of Hooghly, dated the 30th August 1881, affirming the decree of Baboo Huri Nath Roy, Officiating Munsiff of Serampore, dated the 29th December 1880.

(1) 20 W. R., 382.

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Neel Monee Pal (1), where it was held that a patnidar cannot, of his own option, relinquish his tenure, is applicable to all intermediate tenures between the zemindar and the cultivator of the soil, except those held on farming leases.

THIS suit was brought by the plaintiff for the recovery of Rs. 532-8, being the balance of rent due for the year 1879 by the defendants, under the following dur-maurasi mokurari settlement, which he alleged he had made with them on the 10th Assin 1282 (25th September 1875).

"Our Company having applied for a dur-maurasi mokurari pottah of five beegahs of land, according to measurement, within the undermentioned boundaries, you give us a dur-maurasi mokurari pottah, at the fixed annual rent of Rs. 625, and we give you this kabuliat. From this day, we become owners of the said five beegahs of land under the dur-maurasi pottah right, and become vested with the right of making gift and alienation, and being vested with the rights that you possess, and paying the rent of the said land, we and our heirs and representatives from generation to generation shall for ever enjoy and possess the same, directly or by sub-letting the land, building houses, digging tanks, making gardens, and establishing a coal depôt, or in any other way we like."

The defence set up in the written statement was that by a notice, dated the 29th April 1879, the defendants had informed the plaintiff that they would give up the land in suit in the month of Assar 1286 (June—July 1879). They then paid the rent up to the end of Assar, and since then had ceased to hold possession of the land.

Baboo *Nilmadhub Bose* for the appellant.

Baboo *Juggudanund Mookerjee* for the respondents.

The following judgments were delivered by the Court (GARTH, C.J., and FIELD, J.)

GARTH, C.J. (after shortly stating the facts, continued)—I think that both the lower Courts have taken an erroneous view of the law in this case. In the Munsiff's Court two issues were raised: first, whether the defendants did relinquish the land; and, secondly, whether the relinquishment was good in law. With regard to

the first point, which was a question of fact, the Munsiff found that the defendants had relinquished the land, and that they had given the notice to quit, upon which they relied. And upon the second point, namely, whether the notice was good in law, the Munsiff found that it was, holding, apparently, that a lessee, under a lease of this kind, was at liberty, after due notice to his landlord, to relinquish his lease, and that upon relinquishing it, and holding no further possession of it, his obligation was at an end.

The Subordinate Judge appears to me to be rather doubtful about confirming the view of the law which the Munsiff had laid down. He says: "That the defendants gave three months' previous notice of their intention of relinquishing the holding, and afterwards actually relinquished the same, has been satisfactorily proved. Plaintiff could not prove that the defendants occupied the land after relinquishment." Then he goes on to say (by way, as it seems to me, of making himself secure whether his view of the law was right or no): "It appears that the plaintiff brought this suit after more than a year; his long silence to make any objection may be considered as his accepting the relinquishment, for if he did not do so, he could have given defendants a notice that he would not accept. I therefore think that he must have consented to the relinquishment."

It has been boldly argued before us, on behalf of the respondent, that the Munsiff was right, and, indeed, that both Courts were right, (if the Subordinate Judge intended to agree with the Munsiff), in saying that the tenant, under a lease of this character, had a right to relinquish the land at his option, whenever he pleased, upon giving due notice to his landlord; and it was also contended, that, whether that was so or not, the notice of relinquishment being proved to have been given, the facts of the case justified the Subordinate Judge in finding that the landlords the plaintiff, had consented to the relinquishment.

Now, in order to see what the question really is, and what is the true nature of the lease with which we are dealing, I will read the language of the kabuliat itself. (His Lordship read the document and continued)

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Of course the terms of this lease are wholly inconsistent with any idea of its creating a ryoti tenure. It is in the nature of a building lease of valuable property, because, in addition to the yearly rental of Rs. 625, which is to be paid for five beegahs of land, there was also a premium of Rs. 1,150 paid by the lessees.

Now it is said that a lessee, who holds under a lease of this kind, is entitled to relinquish his land at any time, and without assigning any reason, if he only gives due notice to the landlord.

Such a contention appears to me absurd. The bargain would then be entirely one-sided. If the learned Junior Government Pleader were right, the lessee might, under such a lease, do what he liked with the property, and then leave it. If there were trees on the land, he might cut them down and remove them; he might excavate pits, or alter the disposition of the land in any way he pleased; and then if he found that the alterations he had made answered his purpose, he might abide by his bargain; but if he found that he had made a bad speculation, and that the alterations were not likely to be beneficial, he might throw up the land and cancel his lease, although the landlord in the meantime might have had good opportunities of disposing of the land to advantage. This would be such an unfair and one-sided bargain, that I should require very strong authority to satisfy me that such was the true view of the law.

We, accordingly, pressed the learned Pleader for some authority in support of his view, and, so far as I can see, the only authorities which he has cited, so far from supporting his contention, are decidedly opposed to it.

He has alluded (amongst others) to a case, decided in 1873 by Mr. Justice Jackson and Mr. Justice Dwarkanath Mitter, *Heera Lall Pal* v. *Neel Monee Pal* (1), which is decidedly against him.

That was a suit, as this is, for rent which was due under a patni, and the patnidar contended that he had surrendered the patni, and had a right to do so, and that he had thus terminated his obligation for rent. Mr. Justice Jackson in giving judgment says: "The point which we reserved for consideration in this case is, whether it is optional with the patnidar to surrender the patni which he holds at any time, and to plead such surrender in answer

(1) 20 W R, 383.

to a suit for rent. We are clearly of opinion that, whether or not the Civil Court might, upon sufficient ground, give relief in a suit brought to dissolve a contract between the zemindar and his patnidar, it certainly is not open to a patnidar, of his own choice to throw up the patni, and, by so doing, escape his liability to pay rent. We do not say that the contract is indissoluble, because many circumstances might arise in which the interference of a Court of justice might fairly be invoked to put an end to it, but the dissolution of such a contract must, we think, be an act of the Court and the result of proper enquiry, and cannot be taken by the patnidar alone, and pleaded in answer to a suit for rent."

This is a direct authority, as it seems to me, against the defendants' contention, but having regard to the fact, that my learned brother, who has been for twenty years in this country, both in executive and judicial capacity, has never even heard of such a contention as has been pressed upon us, I do not think I need say more on this part of this case.

The only other point that remains to be noticed is as to the supposed consent of the notice by the plaintiff. It was contended that there were sufficient grounds in point of law for the Subordinate Judge to find that the lessor has accepted the relinquishment which was tendered by the lessees.

Now what happened was this: I assume, of course, that a notice was given by the lessees to the plaintiff that they would relinquish the lease at the end of Assar 1286; and it appears that a day or two before Assar they paid the rent due for Assar, and they intimated at the same time that they would leave the premises at the end of the month, which they did. Nothing appears to have been said by the plaintiff on this occasion, nor was any communication received from him; and when the lessees set up that they had relinquished the property, he denied having received any notice. However, it was proved that a notice had been sent by post, though it is not suggested that the plaintiff ever *said anything* which could be construed into an express assent. Now was this enough, in point of law, to justify the Subordinate Judge in finding an assent on the part of the lessor to the relinquishment? I am clearly of opinion that it was not. A man who is bound by

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lease to pay his rent cannot, by merely informing his landlord that he is going to relinquish the land, get rid of his obligation, and the mere fact that the landlord silently receives the notice, which the lessee had no legal right to give, cannot be construed, in my opinion, into an assent to the relinquishment; and no Court has any right under such circumstances to find that the landlord did assent.

I am clearly of opinion, that the judgment of the lower Courts should be reversed, and that the plaintiff's claim should be decreed with costs in all the Courts.

FIELD, J.—This was a suit for the recovery of Rs. 532-8, being the rent of the year 1286, together with interest, after giving credit for certain payments made.

The defence to the suit was that a notice was issued on 29th of April 1879, coresponding with the 17th of Bysakh 1286, by the defendant of his intention to give up the land, for the rent of which this suit has been brought; and that this notice was followed up, on the 8th of July 1879, by an actual relinquishment.

Upon this defence one of the issues fixed by the Munsiff was, whether the relinquishment was good in law, and upon this point the Munsiff says: "With reference to the other contention of the defendant, I think that it is not tenable. What is a dur-maurasi mokurari tenure? It is an ordinary contract to pay the rent as long as the tenant would occupy the land, and that the landlord would not be able to eject him or enhance his rent, for which consideration a price is paid. The occupation of the land is the consideration for payment of the rent, and the tenant can, at any moment, say (of course giving the landlord reasonable notice) take back your land and let me go."

On the hearing of this appeal a question was raised as to whether upon the appeal to the Judge in the Court below the question was raised as to whether a tenure of this nature could be relinquished. I think there can be no doubt that this question was raised in the fourth ground of appeal, and this being so, it appears to me clear that the contention of the plaintiff, throughout the whole course of the case, has been that a tenure

of this nature, that is a dur-maurasi mokurari, could not be put an end to by a mere relinquishment on the part of the lessee.

As to the question whether the plaintiff accepted the relinquishment I think there can be no doubt. It was no doubt very wrong for him to deny that which we must take to have been clearly proved, *viz.*, the service of the notice of relinquishment upon him; but according to a principle that has been laid down by the Privy Council we must not, in dealing with this case, allow ourselves to be led to decide otherwise than according to law, because the plaintiff has been ill-advised, or misled into doing, in the conduct of his suit that which was beyond doubt very wrong and improper.

The one question then which we have to decide is, whether a tenure, such as that with which this case is concerned, can be terminated at the will of the lessee by a relinquishment.

Let us see what this tenure is. It is quite clear that it is not a lease of agricultural land. The contents of the kabuliat shew this very distinctly. This being so, the provisions of the Rent Act have no application, and the defendants could not, under the provisions of s. 20 of that Act, relinquish their holding.

But it is contended that according to a well known custom in this country, any person holding a permanent interest intermediate between the zemindar and the cultivator may, of his own option, unless he has restrained himself by an express provision to the contrary, relinquish such interest or tenure.

I am bound to say that this is a proposition which I have never heard advanced until this case came before us; and before the hearing of this case, my impression has always been that no such tenure can be terminated unless with the consent of the landlord, *i.e.*, apart from any question of a sale for arrears of rent brought about by the action of the landlord himself.

In support of the proposition advanced for the defendants three cases have been quoted to us from the reports of the Sudder Dewany Adawlat. The first of these cases is that of *Kowla Kant Mukerjea* v. *Ram Mohun Gosain* (1). The marginal note of that case, which is substantially correct, is as follows: "The right of landholders of patni taluks of

(1) 2 Sel. Rep, 325.

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the second or lower degrees in the zemindari of Burdwan, is not liable to be cancelled by the resignation of the patnidar who granted the taluk. It can only be cancelled by a public sale for arrears of revenue." This stands to reason. If an individual having taken a patni taluk from the zemindar, and having, according to the well-known custom of that district, granted a number of darpatnies for a considerable amount of salami, could afterwards go to the zemindar, resign his patni, and thereby destroy the interest of the darpatnidars, the door would be opened for a large amount of fraud. Of course, the zemindar may, if he chooses, accept the relinquishment of the patni, but, by doing so, he is in no better position than an assignee of the patnidar. This case certainly does not shew that, either by the law or custom of the country, a patnidar has any right, of his own option, to relinquish his tenure, and thereby free himself from future liability for rent.

The next case relied upon is that of *Rajah Kishen Chunder Bahadoor* v. *Shunkeree Dassee* (1). Now, in the first place, that was a case, not of an intermediate tenure in the nature of a taluk, but a case of a farming lease; and it further appears that proceedings had been taken to enhance the rent, and that after those proceedings, the lessee, alleging that, according to the valuation of the officer deputed for the purpose of increasing the assessment, an excessive rent had been imposed, sought to resign the lease. It appears to me that this case also does not support the proposition advanced before us. It is just and reasonable that a person who takes a maurasi lease at a fixed rent should be bound to hold the land so demised, and pay the rent according to the terms of the lease; but the same justice and the same reason have no application, when one of the most important conditions of the original contract is altered, and the rent is enhanced. The lessee may very justly say to his landlord that, under the original contract, I agreed to pay that rent for the term of the lease. I certainly deny that you can raise the rent and compel me to continue to hold the tenure whether I desire to do so or not.

The third and last case quoted from the report of the Sudder Dewany Adawlat is a case of *Omachurn Chuckerbutty* v. *Hur-*

(1) 7 Sel. Rep., 174.

chunder Haldar (1). That was also a case of a farming lease, and the only question decided related to the stamp required for an *istafa* or relinquishment. This observation disposes of that case as an authority upon the question before us.

It thus appears to me that none of the cases quoted from the Sudder Dewany Adawlat Reports support the allegation that has been made before us, while there are many cases to be found in those reports which go to shew the contrary.

The very learned Chief Justice has dealt with the case of a patni tenure in which it was distinctly held that a patnidar cannot, of his own option, relinquish his tenure, and, so far as I understand the law of this country, the principle of that case is applicable to all intermediate tenures between the zemindar and the cultivator of the soil, and in this term tenure I do not here include a farming lease.

I think, therefore, that the alleged relinquishment was no answer to this suit for rent, and that this appeal must be decreed with costs.

Appeal allowed.

SMALL CAUSE COURT REFERENCE.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Wilson.

CARLISLES, NEPHEWS AND CO. (PLAINTIFFS) *v.* HURMOOK ROY AND ANOTHER (DEFENDANTS.)*

1883
February 28.

Contract—Construction of Contract—Printed form of Contract—Writing and Printing—Sale of Goods to arrive.

The defendants contracted to purchase certain piece goods from the plaintiffs, who were dealers in those goods. The contract of sale was written out on one of the printed forms of the plaintiffs' firm, which forms contained in print, the words "now in course of landing or in the said godowns" and "now on board ship." As a matter of fact, well known to both parties, the goods contracted for were neither in the godowns nor on board ship.

Held, that under the circumstances the printed words above set out formed no part of the contract entered into between the parties.

* Small Cause Court Reference, from an order made by H. Millett, Esq., Chief Judge of the Calcutta Small Cause Court, dated the 5th of July 1882.

(1) S. D. A., 1855, p. 205.

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CARLISLES NEPHEWS & Co. v. HURMOOK ROY.

THIS was a reference from the Chief Judge of the Calcutta Court of Small Causes. The terms of the reference are as follows :—

This suit is brought by the plaintiffs to recover Rs. 678-7-3 as damages by reason of the failure of the defendants to take delivery of certain goods under a contract, dated 11th August 1880.

Certain facts having been admitted by both sides, the parties have practically stated a special case for me to decide on the points of law raised.

The plaintiffs have given up their interest, *viz.*, Rs. 74, and the defendants in turn admitted that Rs. 604-7-3 would be the damages to which the plaintiffs would be entitled if they have legal right on their side.

The contract runs thus—

"The sellers (*i. e.*, the plaintiffs) sell, and the buyers (*i.e.*, the defendants) buy such of the undermentioned goods as have already arrived and are now in the sellers' godowns or as may hereafter arrive and be deliverable at the said godowns at the rates specified, *viz.* :—

P C S	or otherwise 150 cases	per
White Grd. Prints C/2 9 *p yd.*		and now in course of landing or in the said godowns.
To arrive	as P C S $\frac{4145/69}{4175/89}$	

Nov.	Dec	Jan	Feb.	Mar.	April	May	
20	20	20	25	25	20	20 cases.	
45 *chests checks* 105 *chests assorted*			*One month's extension for delivery from the last day of each month in which shipments to arrive. No sales to others.*				now on board ship."

The above is the important part of the contract, which is in English, the italicised words representing the words in writing as distinguished from the printed form of the contract. At the foot one of the defendants' made a note in Nagri of which the following is a translation.

"Hurmook Roy Ram Chunder chintz, shirtings boxes 150, rate 2 annas 9 pies Goods same as before $\frac{\text{condition}}{\text{agreement.}}$ November 2, December 20, January 20, February 25, March 25, April 20, May 20. Godown due 30 days more $\frac{\text{condition}}{\text{agreement}}$ from date 30th ; goods to be taken according to $\frac{\text{condition}}{\text{agreement.}}$

On the same date as this contract the defendants took 40 cases of the same goods (ready goods) under another contract. A suggestion has been made by the defendants' pleader that the Nagri writing, which must control the English, makes a different contract to that stated in the printed form ; but the only difference I can ascertain is, that the defendants say the goods are to be same as before. But the plaintiffs admit that the contract really was for the same class of goods as the defendants had taken before, and

that they (the plaintiffs) have understood it as such. There is therefore no material difference.

Though the contract states it, no cases were, as a matter of fact, in the godown at the time, except those bought under the other contract.

No cases arrived either in November or December, and when they did arrive they were not according to quality. Twenty cases arrived in each of the months of January and February, but they were not according to quality. In March twenty cases arrived according to quality. Notice was given to the defendants, but they declined to take them. This resulted in a correspondence, and on the 5th April 1881, Mr Camell, the defendants' attorney wrote a letter to the plaintiffs, of which the following is a portion:—"I am further instructed to state that the contract having been broken by you my clients contend they are not bound to take delivery of the March instalment, and they therefore decline to take delivery of the 25 cases now offered to them, and they repudiate all liability in respect thereof, and also of the future instalments, and they will defend any action which you may institute against them." The plaintiffs accordingly resold the goods.

In April 20 cases arrived, but they were not according to quality. In May, 20 cases arrived according to quality. Notice was given to the defendants, but they refused to take them, and the plaintiffs resold. The main argument adduced on the part of the defendants is, that the contract is an indivisible one for 150 cases, and that as there was a failure on the part of the plaintiffs to perform the former portion of the contract, the defendants in their turn were justified in refusing to accept both the March and subsequent arrivals, *Honck* v. *Muller* (1) being cited an authority for the proposition. On the other side it is contended, among other things, that this being a contract to arrive, the plaintiffs are not bound to tender delivery unless the goods arrive. Let us see what the material words of the contract are. They are that the sellers sell and the buyers buy such of the undermentioned goods, *i.e.*, 150 cases specifically described as may hereinafter arrive or be deliverable. There can be no difficulty as to the construction of these words. There is nothing ambiguous about them. They mean clearly that the contract is only for such of the goods as may arrive. It is not a contract that the goods shall arrive. If no goods of the specified quality arrived before March 1881, there was no contract to deliver them, but only a contract to deliver them in case they arrived. But if it were necessary to go further than this and put a construction on the words "to arrive," the same conclusion would be arrived at, because the words "to arrive" have already in *Johnson* v. *Macdonald* (2) been construed to mean that the goods shall be sold on arrival. Whether this decision is right or wrong need not affect the construction of this contract, because the words "to arrive" would have to be taken in conjunction with the previous portion of the contract. If then the contract was only to sell such of the goods as did

(1) L. R. 7 Q B. D, 92. (2) 9 M. & W., 600.

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arrive, there was no breach on the part of the plaintiffs previous to March 1881. If, on the other hand, there was a contract to buy such of the goods as did arrive, there was a breach on the part of the defendants to take delivery of the March arrival, and the same may be said as regards the May arrival.

For these reasons I am of opinion that the plaintiffs are entitled to a decree for Rs. 604-7-3.

The defendants' pleader has asked me to refer certain questions to the High Court, which I do in the following form :—

(1.) Is the construction of the contract put upon it the correct one?

(2.) If any other construction can be put upon the contract are the plaintiffs entitled to succeed on the facts, as admitted?

(3) Does the Nagri writing by defendants at the foot of the contract prevail over or control the printed portion thereof?

(4) Are the plaintiffs entitled under the contract to the damages sued for (*viz.* for the 5th and 7th month's deliveries) when they have failed to deliver the 1st, 2nd, 3rd, 4th, and 6th months' goods?

Mr. *Sale* for the plaintiffs was stopped by the Court.

Mr. *M. P. Gasper* (for the defendants.)—We are not bound to take these goods. The sellers warranted that at the time of the contract these goods were partly on boardship, and partly in their own godowns, neither of which was the fact. The goods were not according to quality—*Honck* v. *Muller* (1); *Hoare* v. *Rennie* (2).

Mr. *Sale* (in reply,)—Suppose there were the warranty stated, that would be a separate contract, and be no defence to this suit. [*Garth, C.J.*, referred to *Johnson* v. *Macdonald* (3)] In truth the words relied on by the other side, though they are printed in the paper containing the contract, yet form no part of it whatever, and never were intended to form part of it.

[The Court intimated they would inspect the original contract, before delivering judgment.]

The judgment of the Court (GARTH, C.J., and WILSON, J.) was delivered by

GARTH, C.J.—We think that the judgment of the Court below is correct. It is satisfactory to have seen the original contract, because it seems clear that the printed words in the margin "now in course of landing, &c.," were merely the common form generally used by the plaintiffs' firm, and were not intended to constitute

(1) L. R 7 Q. B. D., 92. (2) 5 H. & N., 19. (3) 9 M. & W., 600.

any part of this particular contract. The argument therefore which was addressed to us upon those words entirely fails.

We think that the questions referred to us should be answered as follows: The first and fourth questions should be answered in the affirmative. The second question of course, does not arise; and as to the third, we do not see that the Nagri writing is at all inconsistent with the English contract.

The defendants must pay the costs of this reference.

FULL BENCH REFERENCE.

Before Sir Richard Garth, Knight, Chief Justice, Mr. Justice Mitter, Mr. Justice McDonell, Mr. Justice Prinsep, and Mr. Justice Wilson.

1883 *February* 28.

IN No. 308.—TITU BIBI (DEFENDANT)
" " 357.—MUNSURUNNISSA BIBI (DEFENDANT)
" " 358.—IBRAHIM MALLA (DEFENDANT)

v.

MOHESH CHUNDER BAGCHI AND OTHERS (PLAINTIFFS.)*

Sale for arrears of rent—Patni tenure—Darpatni tenure—Under tenure—Incumbrance—Beng. Act VIII of 1869, *ss.* 59, 60, 66.

The sale of a patni tenure for its own arrears under ss. 59 and 60, Beng. Act VIII of 1869, does not *per se* avoid the darpatni tenures, but only renders them voidable at the option of the purchaser.

An under tenure is an incumbrance within the meaning of s. 66, Beng. Act VIII of 1869.

THIS case was referred to a Full Bench by MCDONELL and FIELD, JJ., on the 29th of June 1882. The facts are as follows: The plaintiffs claimed rent as darpatnidar of a certain mehal. The patni mehal was sold for its own arrears in Pous 1285, (December 1878) and purchased by certain persons who were not made parties to this suit. The amounts claimed are arrears for the year 1285 (1878). The ryots objected to the suit on the ground that the patni mehal having been sold for its own arrears the darpatni rights had been extinguished, and that in consequence they were not liable to pay the rent to the plaintiffs for the

* Full Bench Reference made by Mr. Justice McDonell and Mr. Justice Field, dated the 29th June 1882, in appeal from Appellate Decrees Nos. 308, 357, and 358 of 1881.

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period subsequent to the sale. They also alleged that they had paid rent for that period to the new purchaser. The Judge of the lower Appellate Court held that the sale of Pous 1285 did not *ipso facto* avoid the darpatni, and he gave the plaintiffs a decree, there being no evidence to show that the purchasers of the patni had ever taken possession of the mehal. The following is the reference to the Full Bench:—

"The question raised in this case is, whether upon the sale of an under tenure, under the provisions of ss. 59 and 60 of Beng. Act VIII of 1869, a subordinate under tenure is *ipso facto* avoided by the sale; or is not avoided until the purchaser by some overt act indicates his intention to exercise his power of avoidance. In the present case a darpatnidar sued the tenants immediately under him for rent; and they have set up as a defence that in consequence of the sale of the patni tenure for its arrears in 1285, the darpatni was *ipso facto* avoided, and the darpatnidar's rights came to an end.

"The lower Appellate Court has held that the darpatni was not *ipso facto* avoided; that the effect of the sale was to make it avoidable only; and that there is nothing to show that the purchaser of the patni has exercised his option of avoidance.

"It is now contended before us, upon the authority of the cases of *Unnoda Churn Dass Biswas* v. *Mothura Nath Dass Biswas* (1), and *Mohini Chunder Mozumdar* v. *Jotirmoy Ghose* (2), that this decision is wrong, and that the Subordinate Judge should have held that the effect of the sale was to avoid the darpatni, irrespective of any act of the purchaser. The question is one of some intricacy, and the decisions of this Court are conflicting. A sale for arrears of revenue and a sale for arrears of rent have, on many occasions, been regarded as analogous; and in considering the consequences of a sale for arrears of rent, an argument has been drawn from the consequences of a sale for arrears of revenue. In the case of *Ranee Surnomoyee* v. *Suteeshchunder Roy* (3), their Lordships of the Privy Council say, [Here his Lordship quoted from 10 Moore's I. A., pp. 143 to 147: "Upon

(1) I. L. R. 4 Calc., 860; S. C. 4, C. L. R., 6.

(2) 4 C. L. R., 422.

(3) 10 Moore's I. A., 123. S. C. 2 W. R., P. C., 14.

the argument before their Lordships"——"According to usages and rate of the Parganas."]

"The case just referred to was followed by the case of *Khajah Assanoollah* v. *Obhoy Chunder Roy* (1), and this latter case is discussed in case of *Kazee Munshee Aftabooddeen Mahomed* v. *Sanioolla* (2). Then comes the case of *Raja Suttya Sarun Ghosal* v. *Mahesh Chandra Mitter* (3). In this case the principle laid down in the case of *Ranee Surnomoyee* was applied to a sale under the subsequent Regulation XI of 1822; and it was laid down that the option of avoidance was to be exercised within a reasonable time. The language of s. 30 of Regulation XI of 1822 was: "All tenures which may have originated with the defaulter or his predecessors, *&c..... shall be liable to be avoided and annulled by the purchaser, &c.*" To the same effect is the case of *Tara Chand Dutt* v. *Mussummat Wakenoonnissa Bibee* (4), which was also decided upon s. 30 of Regulation XI of 1822. In the case of *Koylash Chunder Dutt* v. *Jubur Ali* (5), the same principle was extended to sales under s. 37 of Act XI of 1859, and it was further held that the assignee of a purchaser may exercise the power of avoidance. The language of s. 37 of Act XI of 1859 is: "The purchaser... shall acquire the estate *free from all incumbrances* which may have been imposed upon it after the time of settlement, and shall be entitled to avoid and annul all under tenures and forthwith to eject all under-tenants with the following exceptions." The same language "*acquire it free of all incumbrances*" is used in s. 66 of Beng. Act VIII of 1869.

"In the case of *Madhusudan Kundu* v. *Ram Dhan Ganguli* (6) the same principle was extended to patni sales. Markby, J., referring to the decision upon the Revenue Sale Law, said: "It is true that these decisions turned upon words of the law not precisely similar to those of Regulation VIII of 1819,

(1) 13 Moore's I. A., 317.
(2) 23 W. R, 245.
(3) 2 B L. R, P. C., 30: 11 W. R., P. C., 10.
(4) 7 W. R., 91.
(5) 22 W. R., 29.
(6) 3 B. L. R, A. C. 431; 12 W. R, 383.

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s. 11, cl. 1, but it is clear to my mind that it would be impossible to put a construction upon that Regulation different from that put in those decisions on the Regulation of 1793, of 1822, and Beng. Act VI of 1862 which are all in *pari materia*; and I think it must now be taken as an established principle of law that no sales for arrears of rent have *ipso facto* the effect of cancelling tenures created by defaulting owners, but merely to give to the purchaser the power to do so if he thinks proper, which has not been done in this case." In the case of *Gobind Chunder Bose* v. *Alimooddeen* (1) the same principle was applied to a sale under Beng. Act VIII of 1865. Bayley, J., there said: "The expression used by the first Court is not that it finds that the intervenor was so in receipt of such rents, but to the effect that, *even if he were*, the plaintiff's auction-purchase would over-ride every position that the intervenor might have under the law. In my opinion this is quite erroneous. Section 16, Beng. Act VIII of 1865 enacts 'that the purchaser of an under tenure, sold under this Act, *shall acquire it free of all incumbrances* which may have accrued thereon by any act of any holder of the said under tenure, his representatives or assignees, unless the making of such incumbrances shall have been expressly vested in the holder by the written engagement under which his under tenure was created, or by the subsequent written authority of the person who created it, his representatives or assignees.' But it does not follow that without any act on the part of the auction-purchaser, or any notice of an intention to cancel a pre-existing *miras* tenure, an auction-purchaser might avoid any incumbrance. The real duty of the first Court, therefore, on Beckwith's intervention, was to fix an issue and take evidence and try whether, *firstly*, at the time of the auction-purchase, Beckwith, as dur-mirasdar of Kristo Jibun, was in actual receipt and enjoyment of the rents *bonâ fide* or not. This will include the question as to whether there was any notice given by the auction-purchaser of the cessation of Beckwith's dur-maurasi right, and of the auction-purchaser's intention to exercise his right with reference to the provisions of s. 16, Beng. Act VIII of 1865."

(1) 11 W. R., 160.

"Now, up to this case, there seems to have been a *consensus* of decision that the same principle applied to sales for arrears of revenue and sales for arrears of rent. But then come the cases of *Unnoda Churn Dass Biswas* v. *Mothura Nath Dass Biswas* (3), and *Mohini Chunder Mozumdar* v. *Jotirmoy Ghose* (4), in which a contrary view has been taken. In this conflict of decisions we refer the following questions to a Full Bench :—

"(1) Has a sale under ss. 59 and 60 of Beng. Act VIII 1869 the effect of avoiding incumbrances irrespective of any act done by the purchaser in order to the exercise of the right of avoidance? (1) Is an under tenure an incumbrance within the meaning of s. 66 of Beng. Act VIII of 1869? With reference to the last question, it is to be observed that while the patni regulation provides expressly for incumbrances and under tenures, s. 66 of Beng. Act VIII of 1869 provides for incumbrances only."

Baboo *Nil Madhub Bose* for the appellants.

No one appeared for the respondents.

The judgment of the Full Bench was delivered by

GARTH, C.J.—In answer to the questions referred to us, I think that an under tenure is clearly an incumbrance within the meaning of s. 66 of the Rent Law of 1869, and I also think that, for the purposes of this case, the effect of a sale for arrears of revenue under Regulation VIII of 1819 is substantially the same as that of a sale for arrears of rent under s. 37 of the Rent Law. In either case the under tenures are not *ipso facto* avoided by the sale, but are voidable only at the option of the purchasers.

In the case of *Unnoda Churn Dass Biswas* v. *Mothura Nath Dass Biswas* (2) the question which we have now to decide was hardly considered. That case came up on appeal before my learned brothers and myself from a decision of Mr. Justice Markby and Mr. Justice Prinsep, who had differed as to the time within which a purchaser under the Rent Law was bound to bring a suit to cancel an under tenure.

(1) I. L. R., 4 Calc., 860 : S. C., 4 C. L. R., 6.
(2) 4 C. L. R., 422.

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Mr. Justice Markby thought that the purchaser, in order to entitle himself to sue, must give some notice of his intention to cancel the under tenure within a reasonable time after the sale. Mr. Justice Prinsep was of opinion that the purchaser was not bound to give any notice; and that what was a reasonable time for cancelling the under tenure had been defined by Art. 120 of the Limitation Act of 1871.

In this I agreed with my brother Prinsep, and all that we really decided in that case, so far as I am aware, was, that it is not necessary, for the purpose of avoiding an under tenure or other incumbrance, that the purchaser should give any notice, or to do any act before bringing his suit; and that his suit must be brought within the time prescribed by the Limitation Act.

I fear, however, that my own judgment in that case was not as carefully worded as it ought to have been, and that it may have led to an impression, which appears to have been acted upon in subsequent cases, that we intended to lay down as law, that under s. 37 of the Rent Law incumbrances including under tenures were absolutely avoided by the sale.

I consider the view of the learned Judges who referred this case to be quite correct, namely, that for the purpose of the question which we have to determine, the same principle applies to sales of arrears of rent as to sales for arrears of revenue, and that both are only voidable at the option of the purchaser.

The appeals, therefore, in all the cases depending upon our decision will be dismissed.

Appeals dismissed.

SMALL CAUSE COURT REFERENCE.

1883
March 9.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Wilson.

H. MACKINTOSH *v.* C. CROW AND ANOTHER.*
H. MACKINTOSH *v.* G. C. GORE AND ANOTHER.

Interest—Promissory Note—Failure to pay on due date—Enhanced rate of Interest—Penalty—Breach of contract.

Where money is borrowed under a contract for repayment with interest on a certain day, and the contract stipulates that if the money is not paid at the due date it shall *thenceforth* carry interest at an enhanced rate, such a stipulation is not a penalty, and the enhanced rate agreed to be paid may be recovered in its entirety.

Mackintosh v. *Hunt* (1) followed; *Bansidhar* v. *Bu Ali Khan* (2) considered.

THIS was a reference in two cases heard by the Second Judge of the Calcutta Court of Small Causes. The material portions of the reference are as follows:—

This is a suit brought by the plaintiff to recover from the defendants Rs 190 on a promissory note, dated 20th December 1877, which is in these terms:—

"On the 3rd March 1878, we jointly and severally as principals promise to pay Mr. H. Mackintosh, or order, the sum of Rs. 50 for value received allowing him a discount to due date out of it Rs. 10 as agreed upon previously. Should we neglect or fail to pay or delay payment of the amount beyond due date, it shall carry interest from due date to date of final payment at the rate of ten per cent. per mensem."

The note is for Rs. 50, from which was deducted Rs. 10 as discount at the time the loan was given, so that Rs. 40 was all that the defendants received. They have already paid Rs. 110 towards interest, and the present claim is for Rs. 50 as principal and Rs. 140 as interest, making a total of Rs. 190. The amount of interest on a loan of Rs. 50 or more, properly speaking Rs. 40, which has already been paid and is still payable,

* Small Cause Court Reference No. 7 of 1882, from orders made by Baboo Koonjo Lall Bannerjee, Second Judge of the Presidency Small Cause Court, Calcutta, dated the 1st of July 1882.

(1) I. L. R., 2 Calc., 202. (2) I. L. R., 3 All., 260.

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is Rs. 240, which is six times the actual amount of the loan: and the contention is that the amount of interest claimed after due date of the note is a penalty, and that as such the Court has a discretionary power to award a reasonable rate of interest, and that if the Court exercise this discretion, there would be found nothing due to the plaintiff. A further plea of fraud in the original contract has also been raised, of which no evidence has been given.

The defendants' pleader relies, in support of his argument, upon the following authorities:—*Rajah Baroda Kant Roy* v. *Bhagwan Dass* (1); *Din Doyal Lall* v. *Hetnarain Singh* (2); *Cook* v. *Fowler* (3); *Chuhar Mal* v. *Mir* (4); *Mazhar Ali Khan* v. *Sardar Mal* (5); *Bansidhar* v. *Bu Ali Khan* (6); *Khurram Singh* v. *Bhawani Baksh* (7).

These authorities, except *Din Doyal Lall* v. *Hetnarain Singh* and *Cook* v. *Fowler*, and some others, fully support the view contended for. The question whether the stipulation for payment of a higher defaulting rate of interest is a penalty or interest, has at times been viewed in different lights by the highest Courts in India. Mr. Justice Holloway, in *Adanky Ramachandra Row* v. *Indukuri Appalaraju Garu* (8), in an exhaustive judgment has ruled that the higher rate is not a penalty, but liquidated damages. While in *Motoji bin Ratnaji* v. *Shekh Husen* (9), and *Pava Nagaj* v. *Govind Ramji* (10), the Bombay High Court has held that the increased rate of interest is a penalty. Then again in *Mackintosh* v. *Hunt* (11) referred by the First Judge of this Court in a suit on a promissory note, which was worded exactly as the present instrument is, and in which the question whether the higher rate of interest was a penalty or interest was directly put by the learned Judge, the High Court (His Lordship the present Chief Justice and Mr. Justice Macpherson) decided that it was not a penalty but interest. But in another case *Bichook Nath Panday* v. *Ram Lochun Singh* (12), Mr. Justice Pontifex has held that a stipulation to pay the higher rate of interest on a default being made in payment of a smaller rate is a penalty. This view has been clearly shown to be quite in accordance with the principle laid down by Tindal, C.J., in the well-known case of *Kemble* v. *Farren* (13), which, I believe, first laid down the rule that when a larger sum at once became due on failure to make payment of a smaller sum, the former is a penalty.

(1) I. L. R., 1 All., 344.
(2) I. L. R., 2 Calc., 41.
(3) L. R., 7 H. L., 27.
(4) I. L. R., 2 All., 715.
(5) I. L. R., 2 All., 769.
(6) I. L. R., All., 260
(7) I. L. R., 3 All., 440.
(8) 2 Mad. H. C., 451.
(9) 6 Bom. H. C. A. C., 8.
(10) 10 Bom. H. C. 382.
(11) I. L. R., 2 Calc., 202.
(12) 11 B. L. R., 135.
(12) 6 Bing, 141.

Mackintosh v *Hunt* was decided on the 18th July 1877 or nearly five years ago Since then the Judges of the Allahabad High Court, in four successive cases, have held that the higher rate of interest payable in default of the payment of the principal with the lower rate of interest is a penalty, and they accordingly reduced the rate These cases are *Chuhar Mal* v *Mir* (1), *Mazhar Ali Khan* v *Sardar Mal* (2), *Bansidhar* v *Bu Ali Khan* (3), *Khurram Singh* v *Bhawani Baksh* (4), and *Kharaq Singh* v *Bhola Nath* (5)

In the other case the promissory note runs as follows —

' We jointly and severally as principals promise to pay Mr H Mackintosh, or order, in Calcutta the sum of rupees one hundred in the following manner, for value received allowing him a discount to the due date of the instalments out of it as agreed upon previously

"The instalments to be paid thus —

On the 12th July 1880	Rs	10	0	0
On the 12th August 1880	„	10	0	0
On the 12th September 1880 ...	„	10	0	0
On the 12th October 1880 ..	„	10	0	0
On the 12th November 1880	„	10	0	0
On the 12th December 1880 ..	„	10	0	0
On the 12th January 1881 ...	„	10	0	0
On the 12th February 1881	„	10	0	0
On the 12th March 1881 ...	„	10	0	0
On the 12th April 1881	„	10	0	0

"Should we neglect or fail to pay or delay payment of any instalment beyond due date it shall carry interest from due date to date of final payment at the rate of (10) ten per cent per mensem"

The amount claimed is Rs 275, of which Rs 100 is principal and 175 interest The same objections have been raised in this case as in the other case, and treating the condition to pay a higher rate of interest as a penalty, I have directed a verdict to be entered for the plaintiff for Rs 117 8, allowing interest at twelve per cent per annum from the date of the note Both these judgments are contingent upon the opinion of the High Court

The question I respectfully submit is whether, under the circumstances of these cases and the facts found and the authorities quoted, I am right in treating the stipulation to pay the defaulting rate of interest at a higher rate as a penalty, and in decreeing interest at a reasonable rate

No one appeared to argue the reference.

The opinion of the Court (GARTH, C J, and WILSON, J) was delivered by

(1) I L R, 2 All, 715
(2) I L R 2 All, 769
(3) I L R, 3 All, 260
(4) I L R, 3 All, 440
(5) I L R, 4 All, 8

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WILSON, J.—Two rules of law are established by the Legislature of this country :—

First.—That a man is free to contract to pay any rate of interest that he chooses upon money borrowed; and the Courts must enforce it against him, Act XXVIII of 1855, s. 2, and there is nothing to hinder his agreeing with regard to the future as well as the present. He may contract to pay no interest at present, but interest hereafter; or to pay one rate of interest now, and a higher or lower rate hereafter.

Secondly.—By s. 74 of the Contract Act, "when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of such breach is entitled, whether or not actual damage is proved to have been caused thereby, to receive from the party, who has broken the contract, reasonable compensation not exceeding the amount so named." This section, it will be observed, does away with the distinction between a penalty and liquidated damages; and this must be borne in mind in dealing with cases decided before the Contract Act, many of which turned upon this distinction. Under this section, whether a sum would formerly have been held a penalty or liquidated damages, if it be named in the contract as the amount to be paid in case of breach, it is to be treated, much as a penalty was before, as the maximum limit of damages.

The contracts now before us are two, which are substantially similar in their terms. It is sufficient to set out one. (His Lordship read the note set out at page 689 *ante.*)

The question is, whether this note not having been paid at the due date, the plaintiff can recover interest at the rate stipulated for after due date. And to answer this question we must say under which of the two rules of law referred to this contract falls.

Of course, the use of the word *interest* does not conclude the case. The substance of the transaction must be looked to; and many cases have occurred in which what has been called interest has been held to be a penalty under the old law, or to fall under s. 74 of the new.

Thus in many cases the provision has been, that in case of default in payment on the due date, an increased rate of interest shall be payable *from the date of the contract*. Such a provision was formerly a penalty, and is now within s. 74. This was the case in *Rasaji bin Davlaji* v. *Sayana bin Saqdu* (1); *Mazhar Ali Khan* v. *Sardar Mal* (2); and in a recent case before Field, J., and myself, *Muthura Persad Singh* v. *Luggun Kooer* (3).

In another class of cases the contract has been one of loan for a term certain, with a provision that, if default be made in payment of interest, or of an instalment of principal, the whole shall bear an increased rate of interest. This was the nature of the contract in *Motoji bin Ratnaji* v. *Shekh Husen* (4), and in a recent case before Maclean, J., and myself, R. A. No. 99 of 1881.

In *Bichook Nath Panday* v. *Ram Lochun Singh* (5), and in *Khurram Singh* v. *Bhawani Baksh* (6) both these circumstances appear. In *Pava Nagaji* v. *Govind Ramji* (7), the terms of the contract do not clearly appear from the report. But in the judgment it is said that the case of *Motoji bin Ratnaji* v. *Shekh Husen* (4) was precisely in point. At any rate the case was not decided under the section with which we have now to deal.

In all such cases this element is present, that by the terms of the contract a sum is made payable by reason of the breach, capable of calculation at the time of the breach, and payable in all events, though in the second class of cases the payment is spread over a term.

But where, as here, the contract is merely, that if the money is not paid at the due date, it shall *thenceforth* carry interest at an enhanced rate, I do not see how it can be said that there is any sum named as to be paid in case of breach. No one can say at the time of the breach what the sum will be. It depends entirely on the time for which the borrower finds it convenient to retain the use of the money. It is a fresh sum becoming due

(1) 6 Bom. H. C. A. C. 7.
(2) I. L. R., 2 All., 769.
(3) *Ante*, p. 615.
(4) 6 Bom. H. C. A. C. 8.
(5) 11 B. L. R., 135.
(6) I. L. R, 3 All., 440.
(7) 10 Bom. H. C., 382.

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month by month, or as the case may be, for a new consideration. And, in my opinion, the case falls under the first rule of law above mentioned, not under the second. This view of the law was acted upon by this Court in *Mackintosh* v. *Hunt* (1).

A case is referred to by the learned Judge of the Small Cause Court, which may seem to conflict with this view. *Bansidhar* v. *Bu Ali Khan* was decided by a Full Bench of the Allahabad Court. The facts of the case were very peculiar. The document in question was dated the 9th November; it acknowledged a loan of Rs. 50, to be repaid in four days, on the 13th November, and added "in the event of default he shall pay interest at the rate of Re. 1 per diem." The Court held that this last provision was a penalty. Stuart, C.J., says that he regards it as a penalty, and Straight, J., delivering the judgment of the rest of the Court, explains the view somewhat more fully, saying that, looking at the entire instrument, the parties intended, when they spoke of interest, a penalty for each day's default in payment of the principal sum. If I rightly apprehend the principle of that decision it is based on the view that the provision as to interest was intended not to regulate the terms on which the loan was to continue, but to prevent the continuance of the loan, by imposing a penalty of Re. 1 for the first default and treating each day's further delay as a new default, for which a new penalty should be payable. So regarded, the decision is not inconsistent with the view which I take of this case.

I would answer the question referred to us in the negative.

GARTH, C.J.—I agree.

(1) I. L. R., 2 Calc., 202.

APPELLATE CIVIL.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Field

SHYAM CHAND KOONDOO (DEFENDANT) *v* THE LAND MORTGAGE BANK OF INDIA, LIMITED (PLAINTIFF)*

1883 *June* 19.

Sale in execution of decree—Right to sue for damages—Mesne profits—Civil Procedure Code (1877), *s* 266, *cl.* (*e*)

The right to sue for mesne profits is a "right to sue for damages" within the meaning of s. 266, cl (*e*) of the Code of Civil Procedure, and therefore cannot be sold in execution of decree.

Where, therefore, the plaintiff purchased the right to sue for *mesne profits* at a sale in execution of a decree, *Held* that a suit by him to enforce the right was not maintainable.

Baboo *Grija Sunkur Mozoomdar* for the appellant.

Baboo *Chunder Madhub Ghose* for the respondent.

THE facts are sufficiently stated in the judgment of the Court (GARTH, C.J., and FIELD, J.) which was delivered by

FIELD, J.—The Land Mortgage Bank of India is the plaintiff. The facts of the case are apparently somewhat complicated, but when they are understood, they really present no difficulty. The defendant No. 1, Shyam Chand Koondoo, was the 8-annas proprietor of a patni taluk, lot Buradukundi, and as the result of certain litigation, to which I shall presently refer, the defendant No. 2, Durga Churn Shaha, was the proprietor of the other moiety of the same patni.

Durga Churn Shaha, on the 8th of March 1872, mortgaged his 8-annas share to the Bank. The mortgage debt not having been discharged, the Bank took steps upon the mortgage bond, and having obtained a decree was about to bring the 8-annas share belonging to Durga Churn Shaha to sale, when one Shoshi Bhoosan Shaha came in and preferred a claim, alleging a title in himself to

* Appeal from Appellate Decree No 1830 of 1881, against the decree of F W. V. Peterson, Esq, Judge of Jessore, dated the 15th June 1881, modifying the decree of Baboo Kedaresswar Roy, Subordinate Judge of that District, dated the 27th September 1880.

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half of Durga Churn Shaha's moiety, that is, a 4-annas share of the entire patni.

This claim was at the time successful, and in consequence the Bank, abstaining from the further execution of their decree, brought a suit to have a declaration of Durga Churn Shaha's title to the entire moiety of the patni.

This suit was ultimately successful; meanwhile, however, the defendant No. 1, Shyam Chand Koondoo, executed a decree against Shoshi Bhoosan Shaha, the successful objector; and having brought to sale the disputed 4-annas share of the patni taluk, himself purchased it on the 7th of June 1876.

The Bank being successful in the suit brought by it to have a declaration of Durga Churn Shaha's title to the disputed 4-annas share, was about to execute its original decree, but the patni was now allowed to fall into arrears of rent, and was in consequence brought to sale under the provisions of Regulation VIII of 1819.

This sale realized a gross sum of Rs. 26,600: deducting from this Rs. 5,019-13-3, being the amount of rent due to the zemindar, and Rs. 266-1-3, the amount of auction fees to which the Government was entitled, there remained a balance of Rs. 21,314-1-6, being the surplus sale proceeds. Of this amount, Shyam Chand Koondoo took from the Collectorate one moiety, which represented the 8-annas share of the patni, which, without dispute, belonged to him. The other moiety has been taken by the Bank, in consequence of their having successfully made out a title to Durga Churn Shaha's moiety.

The present suit has been brought to recover, first, mesne profits for the period during which Shoshi Bhoosan Shaha and the defendant No. 1, who subsequently purchased his interest, were in wrongful possession of the disputed 4-annas share, and also a sum of Rs. 1,254, which represents the rent due for the disputed 4-annas share during the period of arrear, in consequence of which arrear the summary sale took place under the Regulation.

The Bank bases its claim to the recovery of mesne profits upon the allegation that in execution of a decree the Bank purchased the right of Durga Churn Shaha, the defendant No. 2, to recover

damages for the period of the wrongful possession of Shoshi Bhoosan Shaha and Shyam Chand Koondoo.

Upon the hearing of this appeal, it appeared to us that the cause of action thus alleged will not entitle the Bank to recover.

Under the provisions of s. 266 of the Code of Civil Procedure, certain property therein specified may be sold in execution of a decree for money. The proviso to that section excepts certain items, and, amongst those items, we find in clause (*e*), "mere rights to sue for damages."

Now there can be no doubt that mesne profits are damages; and this being so, it appears to us that Durga Churn Shaha's right to sue for these damages could not have been sold in execution, and that therefore the plaintiff, having purchased that right, has taken nothing upon which he can base a cause of action capable of being maintained in a Court of justice.

Then as to the sum of Rs. 1,254 for rent, we think that this sum also represents the profits of the property appropriated by the person in wrongful possession. No doubt the sum ought to have been paid as rent; and inasmuch as it was not paid as rent, and so never reached the hands of the zemindar, we think that the plaintiff cannot, by giving the defendant credit in that portion of his claim which is concerned with mesne profits, alter the character of this particular item of claim.

It has been contended before us that this particular sum ought to be regarded as representing the disputed 4-annas share of the property. No doubt, when property to which a person has, successfully set up a title is sold otherwise than by private sale, pending his litigation, and surplus sale proceeds remain in the hands of the Civil Court, those surplus sale proceeds are property regarded as representing the immovable property; but it appears to us that the present case does not fall within this principle. The sum of Rs. 1254 never did, in the hands of the Collector, represent surplus sale proceeds, because the zemindar was entitled to take this amount out of the gross sum of Rs. 26,600 realized, and this amount is not included in, and does not constitute any portion of the remainder, Rs. 21,314-1-6, which alone, in the hands of the Collector, can be regarded as surplus sale proceeds.

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Such are the facts of the case; but it appears to us that, although the plaintiff may have misconceived the cause of action, the equity of the case is on his side, and under these circumstances we will allow the appeal to stand over until Monday next, with a view to consider any application that may be made to us for the amendment of the plaint. We reserve the question of costs.

Subsequently the following order was made:—

The respondent is allowed to amend the plaint as prayed. The case will be sent back to the Court of first instance to be tried *de novo* on the plaint so amended, upon the plaintiffs paying to the defendant the costs incurred by him in all the Courts on the amount claimed, less the sum in respect of which the amendment is allowed.

The costs in regard to the sum as to which the amendment is allowed will abide the result of the trial hereby directed.

Case remanded.

Before Mr Justice Mitter and Mr Justice Norris

1882 *December* 6

LUTCHMEEPUT SINGH (PLAINTIFF) v SADAULLA NUSHYO AND OTHERS (DEFENDANTS)*

Limitation Act (XV of 1877), s 26—Dispossession—Fishery—Custom—Suit to restrain fishing in certain Bhils.

In a suit to restrain the defendants from fishing in certain bhils, which admittedly belonged to the plaintiff's zemindari, it appeared that the plaintiff had let out some of the bhils to ijaradars who had sued the defendants for the price of fish taken by them from the bhils, and that the suit had been dismissed, on the ground that the defendants, in common with other inhabitants of the villages in the zemindari, had acquired a prescriptive right to fish in the bhils The defendants contended that they had been in possession of the bhils for more than 12 years, and that they had a prescriptive right to fish therein, under a custom according to which all the inhabitants of the zemindari had the right of fishing

Held, that the mere fact that the defendants had trespassed and had misappropriated fish did not amount to a dispossession of the plaintiff, and that the suit was not barred by limitation.

* Appeal from Appellate Decree No 2156 of 1880, against the decree of J R Hallett, Esq, Officiating Judge of Rungpore, dated the 25th June 1880, affirming the decree of Baboo Bhugwan Chunder Chuckerbutty, Subordinate Judge of that District, dated the 20th March 1880.

Parbutty Nath Roy Chowdhry v. *Mudho Paros* (1), distinguished.

Held, also, that no prescriptive right of fishery had been acquired under s. 26 of the Limitation Act, and that the custom alleged could not, on the ground that it was unreasonable, be treated as valid.

Lord Rivers v. *Adams* (2) followed.

Baboo *Rashbehary Ghose* and Baboo *Sreenath Dass* for the appellant.

Baboo *Chunder Madhub Ghose* and Baboo *Hurry Mohun Chuckerbutty* for the respondents.

THE facts of this case sufficiently appear from the judgment of the Court (MITTER and NORRIS, JJ.) which was delivered by

MITTER, J.—The plaintiff is the patnidar of Pergunnah Batasone. The defendants Nos. 1 to 9 are the inhabitants of Roopsi, the defendants Nos. 10 and 11 are the inhabitants of Joroollahpore, and the defendants Nos. 12 and 13 are the inhabitants of Manipore. The villages of Roopsi, Joroollahpore and Manipore appertain to the zemindari of Pergunnah Batasone.

The plaintiff brought this suit praying for an injunction against the defendants to restrain them from fishing in certain bhils set out in the schedule to the plaint, and for a declaration that they had no right of fishing in the aforesaid bhils.

The grounds of action stated in the plaint are, that the bhils in question appertain to the zemindari of Pergunnah Batasone, of which the plaintiff is the patnidar; that the plaintiff is in possession of the fishery right in the said bhils; that out of these bhils, bhils Kendra and others, named in the second paragraph of the plaint, were let out in ijara to Kholie Mahomed and Deve Nushyo for three years, from 1283 to 1285 (1876 to 1878); that during the term of this ijara lease the defendants, in the months of Falgoon and Cheyt 1283, (February and March 1877) without the permission of the ijaradars, having caught and taken away fish from these bhils, the said ijaradars brought a suit for damages against them; that in that suit it was held by the Courts that the defendants, in common with the inhabitants of the villages mentioned above, had a prescriptive right to catch fish in these bhils,

(1) I. L. R., 3 Calc., 276. (2) L. R., 3 Ex. D., 361.

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using for the purpose certain specified fish traps; that the defendants are still continuing to fish in these bhils in the manner stated above; that they have no right of fishing in these bhils, the julkur right in which is owned and held by the plaintiff.

The prayers mentioned above were based upon these allegations.

The defendants in their written statement stated that the plaintiff did not possess any julkur right in these bhils; that neither he nor his predecessor in title ever held the possession of julkur right in them; that the defendants and other tenants of Pergunnah Batasone and the tenants of Pegunnahs Koondi and others had been in possession of the aforesaid julkur right under an adverse title for more than twelve years; that the tenants of these pergunnahs had exercised their right of fishing in these bhils from time immemorial for generation after generation.

Upon these allegations the lower Courts substantially raised the following issues: (*1st*), Is the suit barred by limitation; (*2nd*), Has the plaintiff any right in the disputed julkur; (*3rd*), Have the defendants in common with the tenantry of pergunnahs Batasone, Koondi, &c., any right to fish in the disputed julkur; (*4th*), Whether the defendants, in common with the tenantry of Batasone, Koondi, and other pergunnahs have any prescriptive right to fish in these bhils.

The lower Courts have dismissed the plaintiff's suit. It is clear from the judgments that the plaintiff is the owner of the disputed bhils. This fact was admitted. The lower Courts, however, have laid some stress upon the fact which they find, *viz.*, that the plaintiff does not pay the revenue of these bhils; but the fact that these bhils appertain to his zemindari being admitted, it seems to us incomprehensible how the lower Courts could come to the conclusion that no revenue was being paid for these bhils. The Sub-Judge refers to a Punchsona paper in support of this finding. We have referred to that paper, and it is clear to us that it does not afford any ground whatsoever for the conclusion based upon it. We must, therefore, decide this case, taking it as an admitted fact that the plaintiff is the owner of these bhils. The second issue may be, therefore, dismissed from our consideration.

The lower Courts, it seems to us, have dismissed this suit upon the first and the fourth issues. The Sub-Judge based his decision simply upon the plea of limitation; but the lower Appellate Court, while concurring with the decision of the Sub-Judge on the question of limitation, has based his judgment also upon the ground of the defendants having established their right of fishing by prescription.

We are of opinion that the decisions of the lower Courts upon both these questions are erroneous. In order to determine whether the plaintiff's claim is barred by limitation or not, we must see what the finding of the lower Court upon this point is. The Sub-Judge says:—

"They (the defendants) have examined six witnesses, almost all of whom are aged between 50, 60, and 70 years, and prove beyond doubt that the defendants, including the people of the neighbourhood, have been fishing in the bhils from their infancy, their knowledge extending since they came to sense when they were seven or eight years old. It is also amply in evidence that there are shingadars in some of the villages adjacent to the bhils, who, by the sound of their instruments called shinga, would invite the people in the vicinity, who would then assemble together and join in a body to catch fish in the bhils, which the witnesses in this case have styled in the colloquial language the *bowaet* system of fishery." In order to ascertain clearly what this finding really amounts to, we have referred to the witnesses upon whom the Sub-Judge relies. They, without any special reference to the defendants in this case, prove that the tenants of the pergunnahs mentioned above have been in the habit of fishing in these bhils in the manner stated in the passage cited above. This does not, in our opinion, amount to a dispossession of the plaintiff, the owner of the bhils. It cannot be said that the defendants, upon the facts stated above, are in wrongful possession of the bhils. Unless it can be shown that the acts of misappropriation of the fish were done by a person or defined number of persons, the acts of misappropriation, even if they have the effect of depriving the owner of a property wholly of its profits, would not constitute dispossession of the owner. Suppose from a field belonging to A, B and C

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carry away the crops raised by him in one particular year, D and E in the next year, and so on for any number of years—these acts can be only looked upon as mere trespasses, giving to A a right of action for damages against the successive trespassers, but in the eye of the law, the possession of A is not discontinued, because, it cannot be said that any ascertained persons, *viz.*, B and C or D and E, are in wrongful possession of the property in question at any given time. You cannot say that an owner is out of possession unless you can say that a third party is in wrongful possession.

Moreover, supposing that such a fluctuating body, as the tenants of certain pergunnahs, can be said to be in wrongful possession of a property, still, until it is shown that the owner is excluded from the participation of the enjoyment of it, he cannot be said to be out of possession.

For these reasons we are of opinion that the facts deposed to by the witnesses, upon whom the lower Courts rely, amount only to successive acts of trespass, and do not amount to a complete ouster of the plaintiff.

A question similar to this was raised in *Parbutty Nath Roy Chowdhry* v. *Mudho Paroe* (1); but in that case the defendants were ascertained persons who, under a claim of right, continuously exercised the right of taking fish from a bhil; and it was held that they were in possession for more than twelve years of an interest in land. Accordingly the claim of the plaintiff, who was the owner of the bhil, to restrain the defendants from exercising that right, was held to be barred by limitation. It is obvious that the distinction between that case and the present is,—that in the former some ascertained persons were proved to have been in adverse possession for more than twelve years of an interest in an immovable property; in the present case, it has been already shown that no defined and ascertained persons have been in continuous possession of the fishery right in these bhils. The plaintiffs claim is, therefore, not barred by limitation.

The next question is, whether the defendants have established a prescriptive right to this fishery right. The learned pleader for the respondents upon this point has relied upon s. 26 of the

(1) I. L. R., 3 Calc., 276.

present Limitation Act. That section requires that any easement which is claimed (a right of fishery has been held now to be an easement under the present Limitation Act—see *Chundee Churn Roy* v. *Shib Chunder Mundul* (1) must be shewn to have been peaceably and openly enjoyed by *any person* claiming title thereto, &c., &c. For the reasons given above, it cannot be said that in this case that right was exercised by any person or persons. The section evidently requires that the same person or persons must be shewn to have exercised that right for a particular length of time. Then, again, from the length of user (a fact found by the lower Courts in favor of the defendants), it cannot be presumed that there was a grant by the Sovereign Power. It seems to us that the presumption of a grant is impossible; because in this case it cannot be shewn that there was some ascertained grantee or grantees. The Subordinate Judge was of opinion that the tenants of the several pergunnahs, in whose favor the right in question is claimed, must be considered to constitute a unit, —that is to say, he considers that they form a corporate body. We fail to see any tangible ground for this assumption. For instance, it may be that such a grant may be presumed in favor of a village community if such community be shewn to possess all the essentials of a corporate body; but we do not see any reason suggested by any evidence on the record which can support the conclusion that the tenants of the different pergunnahs, in whose favor the right in question is claimed, form anything like a corporate body. This point in the defence must, therefore, also fail.

This disposes of the grounds upon which the lower Courts' decisions are based. There remains to consider whether the right, set up by the defendants, can have for its basis a valid existing custom. It seems to us that it is unnecessary to enquire whether such a custom, as the one set up by the defendants, has been established by the evidence. Because, supposing that it has been established in our opinion, it cannot be treated as a valid custom on the ground of its unreasonableness. According to the custom set up there is no limitation to the number of persons entitled to enjoy it. The tenantry may increase to any number, so that,

(1) I. L. R 5 Calc., 945, 6 C. L. R., 269.

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according to this custom, an unlimited number of persons can take away the profits of a private property, and that nothing may be left to the owner. If the defendants are entitled to exercise the right of fishery in the way stated by them, they may take away the whole of the fish stocked in the bhils leaving nothing for the plaintiff, who is admittedly the owner of them. Such a custom as this does not seem to be reasonable. We are, therefore, of opinion that it ought to be rejected as invalid.

Upon these questions of custom and prescriptive right, there is the case of *Lord Rivers* v. *Adams* (1), which is exactly in point. It is true that we are not absolutely bound by the authority of this case, but if the grounds upon which the decision is based be founded upon natural justice, we would be fully justified in following it. On an examination of the reasons given by the Court in that case it will appear that they are not peculiar to any country or any particular state of society, but they are in conformity with the dictates of natural justice.

We are, therefore, of opinion that the decisions of the lower Courts are erroneous and should be reversed. We reverse them accordingly, and decree the plaintiff's suit with costs in all the Courts.

Appeal allowed.

PRIVY COUNCIL.

P. C.*
1882
November 28.

OMRAO BEGUM AND ANOTHER (PLAINTIFFS) AND THE GOVERNMENT OF INDIA AND ANOTHER (DEFENDANTS)

[On appeal from the High Court at Fort William in Bengal.]

Jurisdiction of Commissioners appointed under the Nawab Nazim's Debts' Act (XVII of 1873).

The Commissioners appointed under the Nawab Nazim's Debts' Act XVII of 1873, (2) having ascertained and certified that a certain zemindari was nizamut property, (*i.e.*, held by the Government for the purpose of upholding the dignity of the Nawab Nazim for the time being), the fact that

* *Present:* LORD FITZGERALD, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH, and SIR A. HOBHOUSE.

(1) L. R. 3 Ex. D., 361.

(2) An Act to provide for the liquidation of the debts of the Nawab Nazim, and for his protection from legal process.

this property had, before the passing of the Act, been conveyed by the Nawab Nazim to his son, did not deprive the Commissioners of jurisdiction to deal with the question. The plain language of s. 12 of the Act is not controlled by any words in the preamble.

A suit brought by a claimant against the Government and the grantee to recover the property, without the Nawab Nazim having been joined as a party, could not proceed.

APPEAL from a decree of the High Court, dated 26th April 1880, affirming a decree of the Judge of the Murshedabad District dated 29th May 1878.

The question raised on this appeal was whether the suit, out of which it had arisen, could proceed without the Nawab Nazim of Bengal having been made a party to it; and this, again, depended on whether the Commissioners appointed under the Nawab Nazim's Debts' Act XVII of 1873 had had jurisdiction to certify a zemindari to be nizamut property.

The appellants were the daughters of one Mehdi Ali Khan, who died on the 4th of January 1865, and were entitled by Mahomedan law to seven-eighths of his estate. He was the half brother of Amirannissa Begum, a deceased widow of a former Nawab Nazim. This widow had in her lifetime purchased a zemindari in the Murshedabad District, named Pargana Gopinathpur, which she held, not in her own name, but in that of Mehdi Ali. On her death in 1858, a question arose as to whether the succession to her estate was to be governed by the Mahomedan law, in which case Mehdi Ali would have succeeded to it, or by a custom alleged by the Nawab Nazim to the effect that the latter was the heir of every "gaddinashin Begum," or wife of a Nawab Nazim, such as Amirannissa had been.

Mehdi Ali received maintenance from the Nawab Nazim, not taking the zemindari; and on the 24th February 1858, he and his wife executed a la-dawa-nama, or deed renouncing claim, receiving a grant by purwana from the Nawab to the effect that "His Highness should grant to Mehdi Ali Khan and his heirs from generation to generation, Rs. 600 per month, upon condition that he should always remain submissive to the Nawab and never depart from this arrangement. On the death of Mehdi Ali in 1865, an order was made, by the Magistrate having jurisdiction,

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under s. 318 of the Criminal Procedure Code then in force, placing Gopinathpur in the possession of the present appellants. Litigation followed, the Nawab Nazim obtaining a decree for the possession of Gopinathpur, on the ground that his was the better title, upheld on appeal both by the High Court at Calcutta and by order of Her Majesty in Council. According to the final judgment in that case given in 1875, their Lordships saw no reason to doubt that both Mehdi Ali and the Nawab at the time of the execution of the la-dawa-nama of 1858, and of the purwana, believed, *bona fide*, that the Nawab had a right to succeed to Amirannissa's estate; and that those two instruments amounted to a valid contract by which the Nawab Nazim and Mehdi Ali were respectively bound; and they maintained the title of the former to Gopinathpur. Meantime, and some years before this judgment was given in his favor, *viz.*, on the 11th February 1869, the Nawab had made a gift of this zemindari to his second son Humayun Kader Mahomed Ali Mirza Bahadur, commonly called Amir Saheb, the second respondent in this appeal.

In 1870 the present appellants, alleging that the maintenance, Rs. 600 per month, had not been paid, sued the Nawab Nazim for recovery of the estate of Amirannissa, and also for arrears of the maintenance. They obtained a decree for the latter only to the amount of Rs. 50,000, confirmed by the High Court in 1872.

On the 24th November 1873 the Nawab Nazim's Debts' Act XVII of that year came into operation, and under it were appointed Commissioners having power to investigate claims against the estate of the Nawab Nazim, and to compel the attendance of witnesses for that purpose, with power to ascertain and certify what jewels and immovable property were held by the Government of India for the purpose of upholding the dignity of the Nawab for the time being (1).

(1) Section 11 of Act XVII of 1873 enacts :—

"No suit shall be commenced or prosecuted, and no writ or process shall at any time be sued for against the person or property of the said Nawab Nazim, unless such suit be commenced, or such writ or process be sued for with the consent of the Governor-General in Council, first had and obtained.

"Such consent shall be certified by the signature of one of the Secretaries

The present appellants then preferred a claim before the Commissioners, appointed under the above Act, for Rs 50,000, the amount of the decree which had been given in their favor, but this claim, with one for further maintenance, was rejected.

On the 10th May the Commissioners certified that all the properties of which the Nawab Nazim had taken possession as heir of Amirannissa Begum, including Gopinathpur, became an appanage of his office and state; that he could not convey them to any one else, and that they were held by the Government of India for the purpose of upholding the dignity of the Nawab

The Government having refused leave to the present appellants to execute the decree of 1872 against the property of the Nawab Nazim, they brought this suit in 1877 in the District Court of Murshedabad. They claimed against the Government and Amir Saheb Rs 60,969, the arrears of maintenance decreed, with further arrears up to date, asking in the alternative for a return of Gopinathpur, which had been charged (it was alleged) with the payment of the allowance They alleged that it was bound in the hands of the person to whom it had passed, so that upon non-payment of the allowance, it was recoverable by the plaintiffs. The Nawab Nazim was not made a party to the suit. The defence made by the Government was, amongst other things, that "as the present Nawab Nazim has an interest in the property, the subject-matter of the present suit, the plaintiffs should have made him a party"

On the 4th October 1877 the Court decided an issue framed in regard to this defence that the Nawab Nazim ought to be made

to the Government of India, and every such signature shall be judicially noticed

'And any suit which at any time shall have been or shall be commenced, and any writ or process which at any time shall have been or shall be sued for against the person or property of the said Nawab Nazim, shall be of no effect unless and until the consent of the Governor General in Council, certified in manner aforesaid, is obtained" '

Section 12—"The Commissioners shall ascertain what jewels and immovable property are held by the Government of India for the purpose of upholding the dignity of the Nawab Nazim for the time being, and shall certify the particulars of such jewels and property, and their finding thereon shall be binding and conclusive on all persons whomsoever"

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a party. The Government being empowered by the Act of 1873 to withhold its consent to a suit being brought against him, refused, in February 1878, to grant the necessary permission.

On the 29th May 1878 the Judge of the Murshedabad District dismissed the suit, on the ground that the Nawab Nazim was not joined, and his decision was upheld by the High Court (JACKSON and TOTTENHAM, JJ.) on the 26th April 1880.

The Court said, in dismissing the appeal: "However the suit may be brought, it is clear that it is not one which ought to be allowed to proceed without the Nawab Nazim being a party to it. The Legislature has given the Governor-General in Council full discretion to allow or not to allow the Nawab Nazim to be made a party to such suits; and in this case the Governor-General has refused to grant such permission."

On this appeal,—

Mr. *R. V. Doyne* appeared for the appellants.

Mr. *Graham, Q.C.*, and Mr. *J. D. Mayne* for the respondents.

For the appellants it was contended that the suit had been wrongly dismissed. The question whether the Nawab Nazim should have been made a party to the suit (the only question now raised on the record as it stood) had been incorrectly dealt with. If Gopinathpur had come to the Nawab by inheritance, as it had come, it was an estate which he had power to convey; and if he had done so, thereby parting with his entire interest in the property, he would not be a necessary party to the present suit. Reference was made to the preamble of Act XVII of 1873; and it was contended that the property having passed away from the Nawab Nazim before that enactment, the jurisdiction of the Commissioners under the Act did not attach; and that, although, if they had had jurisdiction, their report would have been conclusive, yet, for the above reason, the matter was beyond their powers.

Counsel for the respondents were not called upon.

Their Lordships' judgment was delivered by

SIR R. P. COLLIER.—This was an action brought by Omrao Begum and Zahuran Begum, daughters of the late Saiyud Mehdi

Ali Khan, against the Government of India and the second defendant, who is called for shortness Amir Saheb, for the recovery of certain arrears of an allowance, or, in lieu thereof, possession of certain immovable property. There is also a claim that the allowance may be charged upon this property, and that if it be not paid, the property be sold for the purpose of payment.

The facts necessary to the decision of this case may be shortly stated. Mehdi Ali Khan was a half brother of Amirannissa, who was the widow of the grand-uncle and predecessor of the present Nawab Nazim of Bengal. A certain estate of Gopinathpur had been purchased by her, benami, in the name of Mehdi Ali, but really for herself. Upon her death the Nawab Nazim claimed, by a custom of the family, all her property. Mehdi Ali, the father of the plaintiffs, raised some question upon this subject, and made some claim to the property himself; but he withdrew his claim upon an agreement, which is to be found in a purwana, not before their Lordships, to the effect that he was to receive Rs. 600 per month, and in consideration thereof to forego any claim he might have, and not to molest the Nawab Nazim for the future. It seems that, notwithstanding the agreement, he took possession of the property, whereupon the Nawab Nazim was put to a suit which finally came before this Board, and in which this Board decided that he was entitled to recover possession of the property in dispute, mainly upon the strength of the agreement, which agreement prevented the defendant from disputing his title. In the Courts of India a suit was brought by the appellants against the Nawab Nazim, to recover, amongst other things, the arrears of the allowance granted to Mehdi Ali Khan; and a judgment for some Rs. 18,000 was obtained in December 1873, about a month after the passing of the Act called the Nawab Nazim's Debts' Act, on which the question in the present case turns.

The Government of India plead, among other things, that the suit could not proceed because the Nawab Nazim was not made a party to it. Whether they are right or wrong in that contention depends upon the construction of the Act which has been referred to—an Act to provide for the liquidation of the debts of the Nawab Nazim of Bengal, and for his protection against

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legal process. The object of this Act was, as stated in the preamble, to put a stop to various suits, to ascertain what property, with respect to which there had been some disputes, was or was not held by the Government of India for the purpose of upholding the dignity of the Nawab Nazim, and for the purpose of exempting him for the future from being sued in the Courts. This Act appointed certain Commissioners for the purpose of determining what claims or debts were enforcable against the Nawab Nazim, and how much it was equitable to pay in respect of them, and gave them this jurisdiction without their being bound by any previous agreement or judicial proceeding; and then it proceeded, by s. 12, to enact thus: "The Commissioners shall ascertain what jewels and immovable property are held by the Government of India for the purpose of upholding the dignity of the Nawab Nazim for the time being, and shall certify the particulars of such jewels and property; and their finding thereon shall be binding and conclusive on all persons whomsoever."

The contention on the part of the appellants has been that the Nawab Nazim having, as it is admitted, executed a conveyance of this property of Gopinathpur to the second defendant, his son, in the year 1859, it was not what may be called nizamut property, and that the Commissioners had no jurisdiction to deal with it, or to declare it to be nizamut property. But it has been very properly admitted on the part of Mr. Doyne that, if they had such jurisdiction, and if they rightly declared it to be nizamut property, then the suit cannot proceed.

Their Lordships are of opinion that the power of the Commissioners under s. 12 is by no means controlled, as it has been contended, by any words in the preamble, but must be construed according to the plain meaning of the language; and that language is, that the Commissioners are to ascertain "what jewels and immovable property are held by the Government of India for the purpose of upholding the dignity of the Nawab Nazim." Whether this property had been conveyed to the son; whether the conveyance was valid; whether it was voluntary; whether it was collusive; or whether it was revocable—all these were questions which would come under the jurisdiction of the Commissioners to decide; and they have held that this property was immovable

property held by the Government for the purpose of upholding the dignity of the Nawab. Their Lordships have no doubt that that was within the jurisdiction of the Commissioners; and if so, as has been very properly admitted, the suit cannot proceed, and the judgment of the High Court was right.

Under these circumstances their Lordships will humbly advise Her Majesty to affirm that judgment; and this appeal will be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants: Messrs. *Wrentmore and Swinhoe.*

Solicitor for the respondents: Mr. *H. Treasure.*

FULL BENCH REFERENCE.

Before Sir Richard Garth, Knight, Chief Justice, Mr. Justice Mitter, Mr. Justice McDonell, Mr. Justice Prinsep, and Mr. Justice Wilson.

MAMTAZUL HUQ AND OTHERS (DECREE-HOLDERS) v. NIRBHAI SINGH (JUDGMENT-DEBTOR.)*

1883 *March* 9.

Beng. Act VIII of 1869, *s.* 58—*Limitation—Landlord and Tenant—Execution of Decree—Instalments.*

On the 10th of July 1878, a rent-decree was passed in favour of certain parties for the sum of Rs. 168, payable in two equal instalments, on the 4th of June 1879 and the 30th of October 1879, respectively. On the 18th July 1881, the decree-holders applied for execution of the decree

Held, by the majority of the Full Bench (GARTH, C.J., and MITTER, J. dissenting) that the application was barred by limitation under the provisions of s. 58, Beng. Act VIII of 1869.

Gureebullah Sircar v. *Mohun Lall Shaha* (1), dissented from.

THIS case was referred to a Full Bench by Mr. Justice Mitter and Mr. Justice Maclean, on the 22nd December 1882, with the following opinions:—

MITTER, J.—As at present advised I am inclined to follow the ruling in *Gureebullah Sircar* v. *Mohun Lall Shaha* (1). As my

* Full Bench Reference made by Mr. Justice Mitter and Mr. Justice Maclean, dated the 22nd December 1882, in appeal from Appellate Order No. 194 of 1882.

(1) I. L. R., 7 Calc., 127: S. C. 8 C. L. R., 409.

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learned colleague is unable to take the same view, I would refer the question arising in this case to a Full Bench. The question I propose to refer is, whether the application for the execution of the decree, dated the 10th July 1878, is barred by the law of limitation.

As my learned colleague agrees to make this reference, the question stated above is accordingly submitted for the decision of a Full Bench.

MACLEAN, J.—In my opinion the order of the District Judge should be affirmed. The question decided by him was, that the application made by the decree-holder, on the 18th July 1881, was a substantive application to execute the decree of the 10th July 1878, against the immovable property of the debtor, and was therefore barred by the provisions of s. 58, Beng. Act VIII of 1869. The Munsiff had decided that the application, which was made on the 18th July 1881, was, in effect, a continuation of an application dated 11th March 1881. This was, in my opinion, entirely a mistake. The application of 11th March 1881 asked for realisation of the judgment-debt in one manner only, by arrest of the debtor. Process issued to that end, but was not successfully executed. The application was therefore exhausted.

The document of 18th July 1881 is in no sense an application made in the manner prescribed by law. It is a mere petition and should not have been acted upon. What the law requires is set out in s. 235 of the Civil Procedure Code, and no other application can be recognized. On this ground alone I would decide that the order, directing that execution should not issue, should stand; but as that point was not taken in either of the Courts below, and as I would affirm the order on other grounds, I proceed to state them.

It is admitted that the decree is for rent and for a sum below Rs. 500, and it is not disputed that it provided for payment of Rs. 168, in two equal instalments, on the 4th June and 30th October 1879. The contention here, which does not appear to have been made below, is that the special rule of s. 58 of the Rent Act is controlled by the provision of Art. 179 (6), Sch. II, Act XV of 1877, and it is argued that where a decree

for rent is passed in the terms of s. 210 of the Code of Civil Procedure, s. 58, Beng. Act VIII of 1869 is not to be applied.

It is certain that s. 6, Act XV of 1877, preserves any special law of limitation, and excludes the general law, and it seems to me that no Court ought to pass a decree which shall affect this provision. The provisions of s. 58, Beng. Act VIII of 1869 are identical with those of s. 92, Act X of 1859, and the latter Act was independent of the Code of Civil Procedure Act VIII of 1859. The provisions of s. 194 of the latter had, therefore, no operation in rent-suits under Act X of 1859. The Rent Law of 1869, s. 34, provides for the application of the Code of Civil Procedure to all suits and proceedings therein, save as in the Act provided. It may be said that section 210 of the Civil Procedure Code is not incompatible with the Rent Law. Granting this, I think, the rule of limitation for an application to execute a decree contained in s. 58 of the Rent Law, is applicable to a judgment passed under the provisions of s. 210 of the Code of Civil Procedure, and if the Court chooses to make a decree in the terms of that section for a sum below Rs. 500, it must do so with regard to the provisions of the Rent Law. In the case before us, the decree was passed by consent of both parties. The last instalment was payable on 30th October 1879, or 15 months 20 days after the date of the decree. The plaintiff must have known that he had 20 months 10 days within which to execute his decree with reference to s. 58, Act VIII of 1869. He waited 16 months 10 days before making any application whatever for execution. His first application of 11th March 1881 was infructuous, and he has made no application according to law since then; but conceding that the petition of 18th July 1881 was an application to execute, it could not be entertained with regard to s. 58, Beng. Act VIII of 1869.

I am unable to follow the ruling in *Gureebullah Sircar* v. *Mohun Lall Shaha* (1), which lays down that the words "from the date of such judgment" in s. 58, Beng. Act VIII of 1869, should be read as

(1) I. L. R., 7 Calc., 127 : 8 C. L. R., 409.

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if they were "from the date when the rent is adjudged to be payable." This decision seems to me contrary to the rulings quoted at the foot of page 131 (1), and to the decision of the Judicial Committee in *The Brenhilda* v. *British India Steam Navigation Co.* (2). It seems to me to be more impolitic to pass a decree, the execution of which shall run contrary to the provisions of s. 58 of the Rent Law than to limit the power given to the Courts under s. 210 of the Civil Procedure Code. The Rent Law, Act X of 1859, was passed while the provisions of s. 194 of Act VIII of 1859 were in existence, and the Limitation Act of 1877, when the Rent Law of 1869 was in force. I see no reason for supposing that s. 6 of the Limitation Act was passed without regard to s. 58 of the Rent Law.

I would, therefore, dismiss this appeal with costs; but I have no objection to the case being referred to other Judges of the Court or to a Full Bench. I concur in the terms of the question proposed by Mitter, J.

Moonshee *Serajul Islam* for the appellants.

Baboo *Jogesh Chunder Roy* for the respondent.

The following judgments were delivered by the Full Bench:—

PRINSEP, J.—I have had the advantage of seeing the judgments of my learned colleagues in this case, and I entirely concur in the opinion expressed by Mr. Justice Wilson. I would only add, as I have already stated in the case of *Gureebullah* v. *Mohun Lall Shaha* (3), that if a reference to the Code of Civil Procedure is necessary to interpret the terms "date of judgment" used in s. 58, Beng. Act VIII of 1869, we find in s. 185 Act VIII of 1859, and also in s. 202, Act XIV of 1882, that the "judgment shall be dated by the Judge in open Court at the time of pronouncing it," and this is supplemented by s. 189 of the former Act and by s. 205 of the Code of 1882; both of which declare that "the decree shall bear date the day on which the judgment was passed." I also confirm the experience of Mr. Justice McDonell, that until the decision of the case of *Gureebullah*

(1) I. L. R., 7 Calc.

(2) I. L. R., 7 Calc., 547 at p 551.

(3) I. L. R., 7 Calc, 127 : 8 C. L. R, 409.

Sircar v. *Mohun Lall Shaha* (1), this view of the law has always been accepted by our Courts ever since I have held judicial office.

WILSON, J.—I would answer the question referred to us in the affirmative.

Section 58 of the Rent Act VIII of 1869 is clear in its terms: "No process of execution of any description whatsoever shall be issued on a judgment in any suit for any of the causes of action mentioned in ss. 27, 28, 29 or 30 of this Act, after the lapse of three years from the date of such judgment unless the judgment be for a sum exceeding five hundred rupees."

I am unable to agree with the view expressed in *Gureebullah Sircar* v. *Mohun Lal Shaha* (1), that the date of the judgment ought to be read as meaning the date at which the sum adjudged is made payable. The date of a decree or judgment and the date of payment under a decree or judgment are two distinct points of time, each of which has frequently been used as the starting point for limitation in the Limitation Acts. And the expression "date of decree," or order, or judgment, is used several times in this Act, as in ss. 53 and 103, and always, so far as I can see, in its ordinary sense.

I think the governing intention to be collected from s. 58 is that small decrees shall not in any event be kept hanging over judgment-debtors for more than three years; and I think that the express provision by which effect is given to that intention must override any provision of the Procedure Code introduced by the general terms of s. 34, even if the effect were to render the provision of the Procedure Code wholly inoperative. This, however, is not quite the case. No doubt, the limits within which a decree for payment by instalments can be made under the Procedure Code, are practically very much narrowed by s. 58 of the Rent Act, and within those limits, I have no doubt that such a decree ought not to be made except by consent, and then not without very great caution; but I suppose such a decree might in some cases properly be made, provided the effect of s. 58 of the Rent Act be always kept in view.

MCDONELL, J.—I think we are bound to construe s. 58 of

(1) I. L. R., 7 Calc., 127 8 C. L. R., 409.

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Beng. Act VIII of 1869 strictly, and to hold that the application for execution in the case referred to us is barred by limitation. I entirely agree with the opinion expressed now by my brother Judges (Prinsep and Wilson) and also by Mr. Justice Maclean in the referring order. It seems to me that the intention of the framers of s. 58 of Beng. Act VIII of 1869 was to prevent any decree for rent when not exceeding Rs. 500 being kept pending over the heads of judgment-debtors for more than three years under any circumstances, and as far as my experience goes, it is only lately that any different construction has been put upon this section. In the view held by the majority, the appeal must therefore be dismissed with costs.

MITTER, J.—The decision of the question referred to us turns upon the true construction of s. 58 of Beng. Act VIII of 1869. It is clear that if we are to follow the construction which the language of the section strictly suggests quite apart from any other consideration, we must come to the conclusion that the application for execution in this case is barred by limitation. It is also unquestionable that we have no right to add to or subtract from the language of a legislative enactment, unless there are adequate grounds for the inference that the Legislature intended something which it has failed precisely to express.

It seems to me that there are adequate grounds for the inference, that the language of s. 58 does not precisely express the intention which the Legislature had in framing it.

Whether for gathering the intention of the Legislature or for construing the words used for expressing that intention, one of the cardinal rules of construction is, that all the parts of a legislative enactment should be read together.

Now s. 34 of the Act says: "Save as in this Act is otherwise provided, suits of every description brought for any cause of action arising under this Act, and all proceedings therein shall be regulated by the Code of Civil Procedure passed by the Governor-General in Council, being Act No. VIII of 1859, &c."

The effect of this section would be to incorporate the provisions of s. 194 of Act VIII of 1859 without any modification, unless the contrary were provided in any other part of the Act. Is the

contrary provided in any other part of the Act? This question must be answered in the negative, unless it can be said that it is so provided *by implication* by s. 58 itself.

It is clear that s. 58 does not contain any express provision upon this point; nor does it appear to me reasonable to infer from it that the Legislature intended that the provisions of s. 194 of Act VIII of 1859 should be incorporated in the former Act with some modification. It is evident that the provisions of the two sections would be repugnant to one another, if we are to put a literal construction upon s. 58. It would be preposterous to hold that in a suit for rent not exceeding Rs. 500, the Legislature under s. 194 conferred upon the Courts the power of ordering in the decree that the amount adjudged shall be paid by instalments, the first of which shall fall after three years from the date of the decree, and at the same time to put a strictly literal construction upon s. 58. Most incongruous consequences would arise from a construction of that nature, because the Legislature in that case would be saying in one and the same breath that a decree of the description mentioned above may be legally passed, but it would be impossible for the decree-holder, under any circumstances, to execute it.

Therefore, unless we can say that there are valid grounds for the inference that the Legislature did not intend to extend the provisions of s. 194 of Act VIII of 1859 at all to the classes of suits not exceeding Rs 500, mentioned in the first part of s. 58 of Beng. Act VIII of 1869, or to extend it with this modification, that the instalments shall range within three years, we must come to the conclusion that the language used in s. 58 fails to express precisely its real intention. I do not think that there are any adequate grounds for the inference that the Legislature intended that the defendants in the suits mentioned in s. 58 should not have the benefit under s. 194 of Act VIII of 1859 conferred upon impecunious debtors, or should have that benefit considerably curtailed. It must be borne in mind that, in the latter case, the time for executing the decree would be shortened by the time which elapses between its date and the dates of the respective instalments. I can

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imagine no reasonable ground which would lead the Legislature to place the decree-holders in these cases in any disadvantageous position.

Furthermore, it seems to me that the necessity for the exercise of the discretionary power under s. 194 of Act VIII of 1859 would arise more frequently in suits for rent than in any other class of suits for money.

I come to the conclusion, therefore, that the language of s. 58 of Beng. Act VIII of 1869 fails to express precisely the intention of the Legislature which was to provide that, in the class of suits mentioned in the first part thereof, the execution must be sued out within three years from the date or the dates when the amount or the amounts decreed became payable.

In another respect also the Legislature in the language used in s. 58 has failed to express its true intention. It is quite evident that it intended in that section to provide for the limitation of the execution of decrees in *all* kinds of suits that may be instituted under the Act, because there is no other section upon the subject, and the s. 34 extended to suits of this description only, the Civil Procedure Code and not the law of limitation applicable to civil suits generally. It is also evident that the Legislature intended that there should be one rule of limitation in respect of suits of the value not exceeding Rs. 500, and another rule regarding the rest.

That being the intention of the Legislature, let us see how far the language used expresses it accurately. The section is to the following effect: "No process of execution of any description whatsover shall be issued on a judgment in any suit for any of the causes of action mentioned in ss. 27, 28, 29 or 30 of this Act, after the lapse of three years from the date of such judgment, unless the judgment be for a sum exceeding Rs. 500, in which case the period within which execution may be had shall be regulated by the general rules in force in respect to the period allowed for the execution of decrees of the Court."

Now, in order to designate the class of suits in which the

value of the subject-matter exceeds Rs. 500, the Legislature uses the words "unless the judgment be for a sum exceeding Rs. 500." This description, if literally construed, would exclude suits for the *possession* of lands valued above Rs. 500. But there cannot be any doubt that the Legislature intended to include this class of suits in the last part of the section because there is no reason why simple money claims should have a longer period of limitation than claims for land. It would appear from the Acts relating to limitation of suits generally that the policy of the Legislature is just the contrary. Longer periods are generally allowed to suits for land than for money claims.

For the foregoing reasons I am of opinion that the Legislature in the first part of s. 58 intended to provide for decrees under Rs. 500 other than those passed under s. 194 of Act VIII of 1859, or s. 210 (the corresponding section) of the present Civil Procedure Code, and that in the latter part it intended to lay down a rule of law applicable to the execution of all other classes of decrees. But it has failed to express this intention precisely by the language of the section. Under these circumstances, in order to give full effect to the intention of the Legislature, it is open to us to modify the language of the law. The cases bearing upon this subject, which are all collected in the 9th Chapter of a text-book on the interpretation of statutes by Maxwell, show to what extent it is allowable to modify the language of an Act, in order to carry out the intention of the Legislature.

In order to give effect to the intention of the Legislature with reference to s. 58 it would not, I think, be an unwarrantable modification of its language if we read it thus: "No process of execution of any description whatsoever shall be issued on a judgment in any suit for any of the causes of action mentioned in ss. 27, 28, 29 or 30 of this Act (*not being a decree under s.* 194 *of Act VIII of* 1859 *or s.* 210 *of Act XIV of* 1882) after the lapse of three years from the date of such judgment, unless the judgment be for a sum exceeding Rs. 500, in which case (and in all

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other cases) the period within which execution may be had shall be regulated by the general rules in force in respect of the period allowed for the execution of decrees of the Court."

Having regard to the cases collected in the 9th Chapter of Maxwell on the interpretation of Statutes already referred to, it seems to me that the above modification of the language of s. 58 is not, as I have already said, unprecedented or unwarranted.

There are some Indian cases in which modifications of a similar nature in the language of a legislative enactment have been made by the Judges.

In *Rhidoy Krishna Ghose* v. *Kailash Chundra Bose* (1) it was held, with reference to s. 92 of Act X of 1859, of which s. 58 of Beng. Act VIII of 1869 is a re-enactment, that the words "be issued" should be altered into "be sued out."

In *Kangalee Churn Ghosal* v. *Bonomalee Mullick* (2), ss. 20 and 21 of Act XIV of 1859, were almost reconstructed; but in *Bai Udekuvar* v. *Mulji Naran* (3), Couch, C.J., was of opinion that the Judges in *Kangalee Churn Ghosal's* case had overstepped the limits allowed to the Judges to modify the language of an Act in the matter of construction.

The cases which bear the closest analogy to the present are *Ultaf Ali Khan* v. *Ram Lal* (4); *Gopala Setty* v. *Damodara Setty* (5); and *Utam Ram Manik Ram* v. *Girdhar Lal Moti Ram* (6). In these cases the same question which is now before us was *virtually* raised. The language of s. 20 of the Limitation Act of 1859, like that of s. 58 of Beng. Act VIII of 1869, did not fit in well with the provisions of s. 194 of Act VIII of 1859, and it was held in these cases that "when a decree awards payments by instalments to be made at particular specified dates, *the date when each instal-*

(1) 4 B. L. R., F. B. 82: 13 W. R., F. B., 3.
(2) B. L. R., Sup. Vol., 709.
(3) 3 Bom. H. C. A. C., 177.
(4) Agra H. C. F. B., 83.
(5) 4 Mad. H. C., 173.
(6) 6 Bom. H. C. A. C., 45.

ment becomes due is to be deemed the date of the decree in respect of that instalment for the purpose of calculating the time within which execution may be issued to enforce payment of it."

For these reasons I am of opinion that in this case the execution of the decree under our consideration is not barred by limitation.

GARTH, C.J.—I regret that I am constrained to differ in this case from the majority of the Court; but I still think it right to adhere to the view which was taken by Mr. Justice Morris and myself in the case of *Gureebullah Sircar* v. *Mohun Lall Shaha* (1).

We all know that, as a general rule, the language of an Act should be strictly construed; and of course under ordinary circumstances the date of a judgment means the day on which the judgment is delivered.

The decision of the Privy Council, which is quoted in the reference, does no more than affirm this general rule, and there was no reason, apparently, in that case why the rule should not be followed.

But here, as explained by my brother Mitter, we have a provision in the Rent Law, which, if construed strictly, would conflict with, or at any rate render nugatory, an enactment in the Civil Procedure Code, in a very large class of cases, where that enactment is especially needed.

Under these circumstances I think we should do our best to reconcile, as far as we can, the two enactments, and to put such a construction upon the language of the one, as not to curtail the beneficial effects of the other.

In the result, therefore, I agree with my brother Mitter that the execution in the case is not barred by limitation.

(1) I. L. R., 7 Calc., 127 : 8 C. L. R., 409.

APPELLATE CIVIL.

Before Mr. Justice Cunningham and Mr. Justice Maclean.

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G. M. REILY (PLAINTIFF) *v.* HUR CHUNDER GHOSE AND OTHERS (DEFENDANTS) *

Sale for arrears of rent—Landlord and Tenant—Sale of a portion of a Tenure—Beng. Act VIII of 1869, *ss.* 59, 60, 64—*Co-sharers—Parties.*

A portion of a tenure cannot be the subject of a sale under s. 64, Beng Act VIII of 1869 so as to give the purchaser the same privilege as he would acquire by the purchase of an entire tenure under ss. 59 and 60.

A landlord who was in receipt of a half share of the rent of a certain tenure caused that share of the tenure to be sold in execution of a decree for arrears of rent. After such sale *A*, the purchaser, took possession. Subsequently the tenant executed a mortgage, and a decree being obtained by the mortgagee the whole tenure was brought to sale in execution thereof and purchased by the mortgagee who proceeded to oust *A*.

In a suit by *A* to recover possession of his half share of the tenure on the footing of his purchase,

Held, that he could not make out a title to the half tenure with the privilege attaching to the purchase of an entire tenure under ss. 59 and 60 of Beng. Act VIII of 1869, and that as it appeared that the mortgagor, whose rights and interests only were thus sold, was only one of several co-sharers, in the absence of the co-sharers who were not parties to the suit, *A* was not entitled to the relief he sought

THE plaintiff in this suit alleged that Lal Khatoun, defendant No. 4, held a jama of Rs. 60-11 under Purno Chunder Roy, defendant No. 3, and one Bepin Chunder Roy, and that the rent thereof was separately paid to the maliks in two equal shares of Rs. 30-5-6 each; that in 1875 the defendant No. 3, in execution of a rent decree against the defendant No. 4, brought his share of the jama to sale, and it was purchased by the plaintiff on the 15th January of that year; that similarly the remaining eight-anna share of the jama was brought to sale by Bepin Chunder Roy, and was purchased by one Gouri Prosad Kundu, and that after their purchase both the plaintiff and Gouri Prosad were in possession

* Appeal from Appellate Decree No 2130 of 1881, against the decree of Baboo Upendro Chunder Mullick, Subordinate Judge of Jessore, dated the 5th August 1881, affirming the decree of Baboo Provunno Coomar Ghose, Munsiff of Magura, dated the 28th February 1881

of their purchased shares by separately collecting rents from the sub-tenants of that tenure; that subsequently Hur Chunder Ghose and Ramdyal Ghose, defendants Nos. 1 and 2, in collusion with the defendant No. 4, made a false mortgage-bond against the latter, and defendant No. 1 obtained a decree thereon, and in execution of that decree fraudulently purchased the jama of Rs. 60-11, and dispossessed the plaintiff of his share. The plaintiff accordingly brought this suit to recover possession of his share upon the basis of his auction-purchase, and on the allegation that the purchase by the defendant No. 1 was a fraudulent one, and as such conferred no right on him.

Defendants Nos. 1 and 2 alone entered appearance and pleaded that the plaintiff having purchased only a share of his undivided tenure of Rs. 60-11, his purchase was illegal and conferred no right on him; that his allegation as to the possession and dispossession were totally false; and that the mortgage-decree and the auction-purchase of the defendant No. 1 were real and *bonâ fide* transactions; that defendant No. 1 alone was in possession of the tenure; and that as purchaser the plaintiff had no preferential right as against him.

The Court of first instance found that the tenure of Rs. 60-11 was an undivided joint estate, and that it was never sub-divided into two jamas as alleged by the plaintiff, though the rent of it was paid separately to the maliks, and that there were several co-sharers in it besides Lal Khatoun. It therefore held that the plaintiff by his purchase of the jama of Rs. 30-5-6 purchased the rights of Lal Khatoun in the moiety of an undivided tenure, and that his purchase was illegal and created no rights in him. That Court also found that after the tenure was purchased by the plaintiff and Gouri Prosad, Ramdyal got up a false mortgage deed in collusion with the Khatouns, and subsequently got possession of the property under that deed by virtue of his purchase. The suit was accordingly dismissed. The lower Appellate Court confirmed that decree, agreeing with the finding of the lower Court that the plaintiff got nothing by his purchase; but it declined to express any opinion as to whether the mortgage transaction was a *bonâ fide* one or not.

The plaintiff preferred a special appeal to the High Court.

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REILY v. HUR CHUNDER GHOSE.

Baboo *Kashi Kant Sen* appeared on behalf of the appellant.

Baboo *Bungsidhur Sen* and Baboo *Rash Behary Ghose* for the respondents.

The judgment of the Court (CUNNINGHAM and MACLEAN, JJ.) was delivered by

CUNNINGHAM, J.—The main question in this case is, whether a portion of a tenure can be sold for arrears of rent under Beng. Act VIII of 1869.

Appellant's case is, that defendant No. 3, who was the landlord of defendant No. 4, and in receipt of a half share of the rent of a tenure rated at Rs. 60-11, caused his share in the tenure to be sold in execution of a decree for arrears of rent. Appellant became the purchaser, and he now claims possession on the ground that he purchased the property free of encumbrances, and that defendant No. 1 has fraudulently and collusively set up a false mortgage by defendant No. 4 and his co-sharers, and in execution of a decree obtained on the mortgage has bought the whole tenure, and ousted appellant from one-half.

Reference to the sale certificate shows that the sale, at which appellant purchased on 15th January 1875, was held under the provisions of Beng. Act VIII of 1869, and that a jama of Rs. 30-5-6 out of Rs. 60-11 was sold.

Both the lower Courts have held that appellant acquired nothing by the purchase, regard being had to s. 64 of the Act referred to. The first Court found that the title of defendant No. 1 was bad, as the mortgage he set up was a fraudulent one.

The lower Court expressed no opinion upon this question.

We think that the decision of the Courts below is correct, so far as it decides that a portion of a tenure cannot be the subject of a sale under s. 64, Beng. Act VIII of 1869, and that appellant cannot make out a title to the half tenure with the privileges attaching to the purchase of an entire tenure under s. 59. It has been established by a number of decisions in this Court that a purchaser under s. 108, Act X of 1859, which corresponds to s. 64, Beng. Act VIII of 1869, acquires the judgment-debtor's rights and interests only.

It appears, however, that the defendant No. 4, whose rights and interests were thus sold, was only one of several co-sharers, and we cannot decide in this case, and in the absence of his co-sharers, what that share was. There are, therefore, no sufficient grounds for saying that appellant has even purchased rights in the tenure to the extent of one-half, and it is therefore unnecessary to remand the case for a decision as to the validity of the first defendant's alleged mortgage and decree as against appellant.

We therefore dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Mitter, Offg. Chief Justice, and Mr. Justice Norris.

JULLESSUR KOOER (DEFENDANT) *v.* UGGUR ROY AND OTHERS (PLAINTIFFS.)*

1882
December 13.

Hindu Law—Inheritance—Mitakshara—Sister—Male Gotraja Sapindas—Stridhan.

According to the Mitakshara law a sister is not in the line of heirs, and is not entitled to succeed in preference to male gotraja sapindas. Nor does an estate inherited by a female become her stridhan. Such estate on her death goes to the heirs of the last male heir, and not to the heir of her separate property.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Gooru Dass Banerjee* for the appellant.

Baboo *Kali Kissen Sen* and Baboo *Golap Chunder Sircar* for the respondents.

THE facts of this case sufficiently appear from the judgment of the Court (MITTER and NORRIS, JJ.) which was delivered by

MITTER, J.—This suit relates to the estate left by one Sheo Prosad Roy, who died in Assar 1270 (June 1863). It is admitted by the contending parties that on Sheo Prosad's death his estate devolved upon his widow, Sunder Kali Kooer, under the Mitakshara law of inheritance which governs the family. Sunder Kali

* Appeal from Original Decree No. 33 of 1881, against the decree of Baboo Kali Prosono Mukerjee, Subordinate Judge of Sarun, dated the 6th November 1880.

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JULLESSUR KOOER v. UGGUR ROY.

died in 1271, (1864) and the estate then devolved upon Komla Kooer, the mother of Sheo Prosad Roy. The dispute which led to the institution of this suit arose on the death of Komla Kooer, which took place on the 26th Assin 1286 (11th October 1879). The plaintiffs are the male gotraja sapindas of Sheo Prosad, descended from his great grand-father, and the defendant, who is in possession of the estate in question, is his sister. The plaintiffs' contention is, that under the Mitakshara law the sister is not in the line of heirs at all. If this contention be correct then there cannot be any question that the decree of the lower Court in favor of the plaintiffs is correct.

It has been urged before us that a sister is a sapinda; and that as all sapindas inherit in order of propinquity, the defendant's claim is superior to that of the plaintiffs'. As to the question of propinquity it is unquestionable that the defendant is nearer of kin than the plaintiffs. Therefore the question for decision is whether under the Mitakshara law all sapindas (including females) are entitled to inherit. This question arose in the case of *Ananda Bibee* v. *Nownit Lall* (1).

For the reasons given at some length there, the conclusion to which I came was, that of the female sapindas only those that are specified by name are heirs according to the Inheritance Law as administered in Behar. It is unnecessary to repeat those reasons again here. I shall consider here the arguments which are peculiarly applicable to the case of a sister.

Then let us see how the question stands upon the Mitakshara itself. The heirship of the sister was sought to be established on the authority of that treatise of Hindu Law in two ways: 1*stly*, it was contended upon an annotation of Balambhatta and Nanda Pundit that in para. 1, s. 4, chap. II, the word "brethren" includes brothers and sisters in the same manner in which "parents" have been explained to include father and mother in para. 2, s. 3, chap. II. With reference to this interpretation all the other commentators and writers of *Nibandhus*, who are followers of the Mitakshara, differ from this opinion. For example even Nilkantha, the author of Vyavaharmayakha,

(1) *Ante*, p 315.

who upholds the sister's heirship upon another ground, controverts this opinion. Moreover, if we are to adopt this interpretation as correct, we must give effect to it to its full logical consequences; we must then hold that the sisters and brothers would succeed simultaneously as joint heirs to the estate of a deceased brother; but such a conclusion as this would be contrary to a well established rule of Hindu law that has obtained in the province of Behar for a long series of years. The observations of the Judicial Committee of the Privy Council made with reference to an argument based upon this contention may well be cited here: "Again," their Lordships observe, "were the arguments in favour of the construction which Mr. Piffard would put upon the Mitakshara far stronger than they really are, their Lordships would nevertheless have an insuperable objection, by a decision founded on a new construction of the words of that treatise, to run counter to that which appears to them to be the current of modern authority. To alter the law of succession as established by a uniform course of decisions, or even by the dicta of received treatises, by some novel interpretation of the vague and often conflicting texts of Hindu commentators would be most dangerous, inasmuch as it would unsettle existing titles"—*Thakooranee Sahiba* v. *Mohun Lall* (1). The same contention was pressed in *Mussamut Guman Kumari* v. *Srikant Neogi* (2), and the Court overruled it in the following words: "That recognition" (*viz.*, the recognition of the sister as heir) "is due to the commentators (*i.e.*, Balambhatta and Nanda Pundit)," and it is clear from the notes that all "other commentators were not of this opinion." This contention must therefore fail.

The other argument in favour of the sister's succession is based upon the following passage of the Mitakshara: "If there be not even brother's sons, gotrajas share the estate," para. 1, s. 5, chap. II. Then in para. 3 it is laid down: "On failure of the paternal grand-mother, saman-gotraja sapindas, *viz.*, the paternal grand-father and the rest inherit the estate." It has been contended that a sister is a gotraja-sapinda, and is therefore entitled to inherit under the text set forth above; but it is clear

(1) 11 Moore's I. A., 386 at p. 403. (2) 2 Sev., 460.

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from these two texts that the author of the Mitakshara intended to designate the same class of persons by the two expressions, *viz.*, "gotraja-sapindas" and "saman gotraja-sapindas" used in paras. 1 and 3 respectively. Therefore the author of the Mitakshara used the word "gotraja-sapindas" not in the sense "of born in the same gotra," but in that of "belonging to the same gotra." A sister after marriage leaves the gotra of her father and consequently of her brother, and acquires that of her husband. Therefore a married sister does not come within the class designated by the expression "gotraja-sapindas" as used in the Mitakshara. This view of these passages of the Mitakshara is also taken by West and Bühler in their treatise on the Hindu law of inheritance and partition at page 180. They say: "The substitution of 'saman-gotraja' for 'gotraja' as well as the employment of 'bhinna-gotra' to designate the opposite of the term, both show that Vijnanesvara took 'gotraja' in the sense of 'belonging to the same family.'" If the term has this meaning it would follow that no married *daughters* of ascendants, descendants or collaterals, can inherit under the text which prescribes the succession of the gotrajas. For the daughters by their marriage pass into another family or, as the Hindu lawyers say in their expressive language, are born again in the family of their husbands. But it seems improbable that even unmarried daughters of gotraja-sapindas can inherit under the text mentioned (*a*). For, though they belong to their father's gotra up to the time of marriage, they *must* leave it, under the Hindu law, before the age of puberty, and consequently by their succeeding to the estate of sapindas belonging to their fathers' families, the object of the law, in placing sagotra-sapindas before the bhinna-gotra-sapindas, *viz.*, the protection of the family property, would be defeated, since such property, through them, would pass into their husbands' families. It seems therefore more in harmony with the principles on which the doctrines of the Mitakshara are based to exclude even unmarried daughters of gotrajas.

For these reasons it seems to me clear that the sister is not in the line of heirs according to the Mitakshara law.

The learned pleader for the appellant further relied upon a passage to be found in the Virmitrodaya at p. 216; but it has

nothing to do with the general question of the right of inheritance of the sister. The passage in question relates only to the subject of succession to reunited property. The author of Virmitrodaya, as already shewn in the case referred to before, is of opinion that of the female sapindas only those that are specified by name are heirs. I am, therefore, of opinion that both these contentions are unsound.

It has been urged in the next place that, supposing the defendant is not entitled to succeed as the heiress of her brother, still there is not the slightest doubt that she is entitled to inherit to the stridhan left by her mother; that according to the Mitakshara law the estate of Sheo Prosad became the stridhan of his mother, because she acquired it by right of inheritance. It has been further urged that according to the Mitakshara law an estate acquired by a female, through the right of inheritance, becomes her stridhan. It is true that there is some foundation for this contention, but the question has been set at rest by the Privy Council decision in *Chotay Lall* v. *Chunnoo Lall* (1). This decision is based upon a uniform current of decided cases, some of which are noted below: *Keerut Singh* v. *Koolahul Singh* (2); *Collector of Masulipatam* v. *Cavaly Venkata Narain Apah* (3); *Mussamut Thakoor Deyhee* v. *Rai Baluk Ram* (4); *Bhugwandeen Doobey* v. *Myna Baee* (5); *Mussamut Bijya Dibeh* v. *Mussamut Unnopoorna Dibeh* (6); *Rughobur Suhaee* v. *Tulashee Kovour* (7); *Punchanund Ojhah* v. *Lalshan Misser* (8); *Narsappa Lingappa* v. *Sakharam Krishna* (9); *P. Bachiraju* v. *Venkatappadu* (10); *Sengalamathammal* v. *Valaynda Mudali* (11); and *Kattama Nachiar* v. *Dora Singa Tevar* (12).

According to these cases an estate inherited by a female does not become her stridhan, and on her death goes to the heir of the last male heir and not to the heirs of her separate property. This appeal therefore fails on all points. We accordingly dismiss it with costs.

Appeal dismissed.

(1) I. L. R., 4 Calc., 744: 3 C. L. R., 465.
(2) 2 Moore's I. A., 331.
(3) 8 Moore's I. A., 529.
(4) 11 Moore's I. A., 139.
(5) Id., 487.
(6) 1 Sel. Rep., 162.
(7) S. D. A., 1847, p. 87.
(8) 3 W. R., 140.
(9) 6 Bom. H. C., A.C., 215.
(10) 2 Mad. H. C., 402.
(11) 3 Mad. H. C., 312.
(12) 6 Mad. H. C., 310.

1883
March 14.

Before Mr. Justice McDonell and Mr. Justice Tottenham.

TOREE MAHOMED (JUDGMENT-DEBTOR) *v.* MAHOMED MABOOD BUX AND OTHERS (DECREE-HOLDERS.)*

Limitation Act (XV of 1877), s. 19, and Sch. II, Art. 179—Execution of Decree, Application for—Acknowledgment in writing.

The mere payment of a Court-fee in connection with execution proceedings, with a view to obtain leave to bid for property then up for sale in execution of a decree, does not constitute "the taking of some step in aid of execution" within the meaning of Art. 179, Sch. II of the Limitation Act (Act XV of 1877), so as to prevent the execution of the decree being barred within three years from the date of such payment.

An application for the execution of a decree is an application in respect of a "right" within the meaning of s. 19, Act XV of 1877, and a petition made by a judgment-debtor, and signed by his vakeel, praying for additional time for payment of the amount of a decree, constitutes an "acknowledgment of liability" within the meaning of that section, and a new period of limitation should be computed from the date of such petition in order to ascertain whether the execution of the decree is barred or not under the provisions of Art. 179, Sch. II of the Limitation Act.

Ramhit Rai v. *Satgur Rai* (1); and *Ram Coomar Kur* v. *Jakur Ali* (2) followed.

THE sole question in this case was, whether the execution of a decree, dated the 26th August 1878, was barred by limitation or not. The application for execution, out of which this appeal arose, was dated the 26th January 1882, and the judgment-debtor contended that it was barred by limitation, as having been made more than three years after any previous application to the Court to take some step in aid of execution of the decree within the meaning of Art. 179, Sch. II of the Limitation Act (Act XV of 1877).

The facts, as admitted by both sides, were as follows:—

The first application for execution was filed on the 7th November 1878, and on the 22nd February 1879 the decree-holders paid a fee of Rs. 2 into Court, in connection with those execution proceedings, with a view to obtain leave to bid for some property then up for sale.

* Appeal from Original Order No. 321 of 1882 against the order of Colonel B. W. D. Morton, B.S.C., Subordinate Judge of Julpigooree, dated 29th August 1882.

(1) I. L. R., 3 All., 247. (2) I. L. R., 8 Calc., 716.

In the lower Court the decree-holders relied on that proceeding as sufficient to withdraw the case from the operation of Art. 179 of the Limitation Act, and the Court adopted that view and disallowed the judgment-debtor's objection.

The latter accordingly appealed, and at the hearing of the appeal the decree-holders contended, in addition, that, inasmuch as a petition was filed by the judgment-debtor on the 21st February 1879, and signed by his vakeel, praying for additional time to be granted him in which to pay the amount of the decree, under s. 19 of the Limitation Act, a fresh period commenced to run from that date, and consequently that they were entitled to the order for execution asked for.

Moonshi *Serajul Islam* appeared on behalf of the appellant.

Baboo *Gooroo Dass Banerjea* for the respondents.

The judgment of the Court (McDONELL and TOTTENHAM, JJ.) was delivered by

TOTTENHAM, J.—The question for decision in this appeal is, whether an application made on the 26th of January 1882 for the execution of a decree, dated the 26th of August 1878, is barred by limitation. The judgment-debtor, appellant, contends that it is barred, as having been made more than three years after any previous application to the Court to take some step in aid of execution of the decree within the meaning of Art. 179 of the Schedule to the Limitation Act.

It appears that execution proceedings were going on in February 1879, and the decree-holders on the 22nd of that month paid a Court-fee of Rs. 2 into Court, in connection with those proceedings. The lower Court has held that this act of the decree-holders was practically such an application as comes within the meaning of Art. 179, and that thus the decree is saved from limitation.

We think that this opinion is not sustainable, for it seems to us clear that the decree-holders did not on that occasion ask the Court to take any step in aid of the execution. It is said that their object was to obtain leave to bid for some property then up

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for sale, but such an application would not, in our opinion, give a fresh starting point. We are aware that very liberal constructions in favor of decree-holders have been put upon Art. 179 by other High Courts in India, but we cannot in this case adopt the interpretation of the Subordinate Judge.

Yet we think that we may upon other grounds support his decision that the decree is not barred. Last of all the several points laid before us by the respondent's vakeel was one which is supported by the authority both of law and precedent. Section 19 of the Limitation Act provides for a new period of limitation from the date of signing any written acknowledgment in respect of a right claimed against the party signing.

A Division Bench of this Court has held, in the case of *Ram Coomar Kur* v. *Jakur Ali* (1), that a petition made by a judgment-debtor, and signed by his vakeel, praying for additional time for payment of the amount of a decree, does constitute such an acknowledgment as is mentioned in s. 19; and that an application for execution of a decree is an application in respect of "a right" within the meaning of that section.

There is a decision of the Full Bench of the High Court of Allahabad to the same effect: see *Ramkit Rai* v. *Satgur Rai* (2). In the present case we find that there was a petition of this kind filed by the judgment-debtor on the 21st February 1879, and signed by his vakeel. Following the precedents above cited, we hold that the present application, made within three years of that one, is in time.

We accordingly dismiss the appeal, but under the circumstances we make no order as to costs.

Appeal dismissed.

(1) I L. R., 8 Calc., 716.
(2) I L. R., 3 All., 247.

ORIGINAL CIVIL.

Before Mr. Justice Norris.

1883
May 7.

MICHAEL *v.* AMEENA BIBI AND OTHERS.

Service of Summons—Service on Agent—Suit to obtain relief respecting immovable property—Civil Procedure Code (Act XIV of 1882), *ss.* 16, 77.

In a suit for foreclosure or sale of immovable property, it appeared that the mortgagee had conveyed the mortgaged premises to trustees. The summons to one of the trustees was personally served upon his duly constituted agent, who was at the time of service in charge of the mortgaged premises.

Held, that the service was sufficient, the suit being one to obtain "relief respecting immovable property" within the meaning of s. 16 of Act XIV of 1882.

Mr. *Trevelyan* for the plaintiff.

The facts of the case sufficiently appear from the judgment.

Norris, J.—This is a mortgage suit. The plaint states that on 8th January 1881 the defendant No. 1 mortgaged certain premises to the plaintiff to secure the repayment of Rs. 12,000 with interest.

By an indenture of 21st January 1882 the defendant No. 1 conveyed the mortgaged premises, subject to the mortgage, to defendants Nos. 2 and 3 upon trust for certain charitable purposes.

The prayer of the plaint is "that an account may be taken of what is due to the plaintiff for principal and interest on the security of the said indenture of mortgage of 8th January 1881, and that in default of payment of the amount to be found due, and of the plaintiff's costs of this suit by a short day to be appointed by the Court in that behalf, the defendants may be absolutely foreclosed of all equity of redemption of and in the said mortgaged premises, or otherwise that the same may be sold under the direction of this Honorable Court."

A question arises as to the sufficiency of the service of the summons on defendant No. 2.

It appears from the affidavits that prior to the institution of the suit the plaintiff was informed that defendant No. 2 was residing

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at Bombay; that after the institution of the suit, on making further inquiries, he was informed that the defendant had left Bombay; that he was unable to find him or to ascertain his correct address, or to find any agent empowered to accept service of the summons; that on 5th January 1883 a copy writ of summons was personally served upon one Hadjee Mahomed Osman, the lawfully constituted agent of defendant No. 2, who at the time of such service was in charge of the mortgaged premises, and was collecting the rents thereof.

Mr. Trevelyan asked me to hold that this was good service under s. 77 of the Civil Procedure Code, arguing that this was "a suit to obtain relief respecting immovable property."

As I was informed that this was the first case in which service had purported to be effected under this section, I took time to consider the matter. As far as I know there is no definition in the Code or elsewhere of "a suit to obtain relief respecting immovable property"; but a reference to s. 16 of the Code seems to show that this suit is such an one. Section 16 says: "Subject to the pecuniary or other limitations prescribed by any other law, suits—

"(*a*) for the recovery of immovable property;

"(*b*) for the partition of immovable property;

"(*c*) for the foreclosure or redemption of a mortgage of immovable property;

"(*d*) for the determination of any other right to or interest in immovable property;

"(*e*) for compensation for wrong to immovable property;

"(*f*) for the recovery of movable property actually under distraint or attachment;

shall be instituted in the Court within the local limits of whose jurisdiction the property is situate."

Then follows a proviso where instead of referring to the suits which in the section are lettered *a*, *b*, *c*, and *d*, by such lettering or as the first four suits above-mentioned or recapitulating them again in full, they appeared to be described collectively "as suits to obtain relief respecting immovable property."

I am, therefore, of opinion that the service is good, and that the case may proceed.

Before Mr. Justice Norris.

RAMNARAIN KALLIA *v.* MONEE BIBEE;

AND

RAMNARAIN KALLIA *v.* GOPAL DOSS SING.

1883
February 22

Practice—Rule nisi to show cause why a person should not be made a party defendant—No grounds stated in or served with the Rule—Rule granted during hearing of suit—Civil Procedure Code (Act XIV of 1882), *s.* 32.

During the hearing of a suit for recovery of immovable property it appeared from the evidence and certain documents put in, that the plaintiff had mortgaged his right title and interest to a third person, by whom the suit was practically being carried on. On an application by the defendant for the mortgagee to be added as a party defendant, under the provisions of s. 32 of the Civil Procedure Code, the Court directed a rule to issue calling on him to show cause why he should not be added as a party defendant or give security for costs. The rule was not applied for on petition or affidavit and set out no grounds for the application at all. On an objection taken by the mortgagee at the hearing of the rule,

Held, that the grounds should have been stated on affidavit or have appeared on the face of the rule, and that the mortgagee was entitled to know what he had to answer, and consequently, the rule being informal, it was discharged with costs.

THE plaintiff instituted these suits, which were heard together, to recover possession of certain properties held by the defendants. Prior to the institution of the suits the plaintiff mortgaged his right, title, and interest in the properties to one Russick Lall Mitter. Some of the defendants in their written statements alleged that the plaintiff was a man of no means, and that the suits were being carried on and maintained by Russick Lall Mitter, and that the plaintiff had executed an agreement and a mortgage of his right, title, and interest over the properties in suit, besides other property, in favour of the said Russick Lall Mitter. In the course of the cross examination of the plaintiff by Mr. *Palit*, who appeared for Monee Bibee, the above facts were proved, and the two deeds were put in as exhibits in the suit. It also appeared, on the face of these documents, that Mr. *H. H. Remfry*, who was acting as attorney for the plaintiff in the suit, had acted as attorney for Russick Lall Mitter in the matter of the execution of those two documents.

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On these deeds being proved and put in, Mr. *Pugh*, who appeared for Gopal Doss Sing, applied, under s. 32 of the Civil Procedure Code, to have Russick Lall Mitter added as a party to the suit, and in support of his application cited, *Chunder Kant Mookerjee* v. *Ramcoomar Kundu* (1); and the same case on appeal to the Privy Council, *Ramcoomar Kundu* v. *Chunder Kant Mookerjee* (2), and contended that being a mortgagee he was a necessary party.

The Court thereupon granted a rule, calling on Russick Lall Mitter to show cause why he should not be made a party, or why he should not give security for costs; and directed that service of the rule on Mr. H. H. Remfry should be deemed to be good service on Russick Lall Mitter.

The following rule was accordingly issued and served :—

"This Cause coming on this day for final disposal before the Hon'ble John Freeman Norris, one of the Judges of this Court, in the presence of Mr. Kennedy, Advocate for the plaintiff in the above mentioned suits, of Mr. Phillips, Advocate for the defendants Monee Bibee Sreemalinney and Woonee Bibee, of Mr. Pugh, Advocate for the defendant Gopal Doss Sing, and of Mr. Sale for Mr. Hill, Advocate for the defendant Rakhal Dass; and upon the application of the Advocate for the said Gopal Doss Sing, it is ordered that Russick Lall Mitter, being served with the order, do, on Monday, the fifth day of February instant, show cause before this Court why he should not be added as party defendant to these suits, or why he should not give security for the costs of the defendants in the abovementioned suits: and it is further ordered that service of this order on Mr. H. H. Remfry, the Attorney for the said Russick Lall Mitter, be deemed good service on the said Russick Lall Mitter. Dated this second day of February in the year of our Lord one thousand eight hundred and eighty-three."

On the 5th an application was made for the postponement of the hearing of the rule, on the grounds of the illness of Russick Lall Mitter and of his inability to instruct Counsel to show cause against the rule.

(1) 13 B. L. R., 530. (2) I L. R., 2 Calc., 233.

The Court granted the postponement asked for, on the understanding that if the order *nisi* were made absolute it would take effect from that date. Pending the hearing of the rule, the suits had been dismissed with costs. Subsequently affidavits were filed by Russick Lall Mitter, and the rule came on for hearing on February 22nd.

Mr. *T. A. Apcar* showed cause against the rule, and without referring to his affidavits contended that there was no ground for the rule, and nothing for him to answer. No grounds whatever were stated on the face of the rule, and it had not even been applied for on petition or affidavit, so that Russick Lall Mitter could not possibly be expected to know what he had to answer. As the proceeding was one in the same nature as that for contempt of Court, he submitted that he was absolutely entitled to have the materials upon which the rule was granted before him, and so be able to know what he had to answer before he could be called on to show cause. There was no rule contained in Belchambers' Rules and Orders bearing on the question ; and as this was an entirely novel proceeding he submitted the rule should be discharged with costs. In support of his contention he cited Archbold, Vol. II, p. 1257, and Tidd's Practice, p. 479.

Mr. *Pugh*.—The application was merely one under s. 32 of the Civil Procedure Code, and, had he been in Court at the hearing, Russick Lall Mitter might have been added at once as a party defendant. [NORRIS, J.—Yes ; if a substantive application was made, but then he would be cognisant of all that transpired, and I should always be inclined to hear what he had to say before adding him as a party.] I don't wish to prejudice him now in any way, but the rule was granted in its present form not at my instance, but at that of the Court, for I merely asked the Court to proceed under s. 32, and not to call on him to show cause why he should not give security for costs. [NORRIS, J.—I think every one on whom a rule is served should, unless he is in Court when the matter is heard, be furnished with the grounds on affidavit, and I will postpone the hearing of this rule for that purpose.]

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Mr. *Apcar*.—The rule being informal can only be discharged with costs. [Mr. *Pugh*.—But Russick Lall Mitter has filed affidavits in reply]. Your Lordship can't look at anything further than the terms of the rule, and there being nothing for him to answer you cannot go into my affidavits.

NORRIS, J.—I think this rule must be discharged. It states no grounds whatever, and in granting the rule I did not intend that it should be drawn up as it has been. If it had been properly drawn up I should have been in a position to hear it, but as it stands now it must be discharged, and under the circumstances discharged with costs. I will grant liberty to apply, on affidavit, for a fresh rule, and I direct that the decree in the suit be not drawn up until the rule is disposed of as I shall give Mr. Pugh every facility for bringing this matter to a hearing.

Rule discharged with costs.

Attorney for the plaintiff: Mr. *H. H. Remfry*.

Attorneys for the defendants: Mr. *E. J. Moses* and Baboo *Bolye Chand Dutt*.

APPELLATE CIVIL.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Mapcherson.

1883 *April* 11.

GOUR HARI SANYAL (DEFENDANT) *v.* PREM NATH SANYAL AND OTHERS (PLAINTIFFS.)*

Practice—Right of respondent, who has filed cross objections, to appeal, where appellant withdraws his appeal.

No leave to appeal should be granted to a respondent who has filed cross objections, unless the Court is thoroughly satisfied upon affidavit that he was ready to appeal, and would have appealed within the proper time if the other side had not done so.

THIS was an application to withdraw an appeal on payment of the respondents' costs; the respondents, who had filed cross objections, submitted that if the appellant's application were granted, they (the respondents) ought to be allowed to appeal.

* Appeal from Original Decree No. 89 of 1881, against the decree of Baboo Nobin Chunder Ghose, Subordinate Judge of Mymensingh, dated the 18th January 1881.

The Court ordered the respondents to file an affidavit on the question, as to whether or not they were ready to appeal, and would have appealed, in due time, if the appellant had not preferred his appeal first.

The contents of this affidavit, and the facts necessary for the purpose of this report, are fully set out in the judgment of the Court.

Mr. *Evans* and Baboo *Grish Chunder Chowdhry* for the appellant.

Mr. *Branson*, Baboo *Srinath Dass*, Baboo *Jogesh Chunder Roy*, Baboo *Kally Churn Mitter* and Baboo *Dwarkanath Banerjee* for the respondents.

The judgment of the Court (GARTH, C.J., and MACPHERSON, J.) was delivered by

GARTH, C.J.—This appeal being set down for hearing on the Peremptory Board, the appellant on Friday last applied to us by petition to withdraw the appeal.

Mr. Branson for the respondents objected, that if the appellant was allowed to withdraw his appeal, the respondents, who had filed cross objections, ought to be allowed to prefer a cross appeal.

As, however, it did not appear under what circumstances the cross objections had been filed, we gave Mr. Branson an opportunity of satisfying us, upon affidavit, that his clients were ready to appeal, and would have appealed in due time if the appellant had not preferred his appeal first.

The case accordingly came on again on Monday last, when Mr. Branson produced an affidavit made by the two plaintiffs (the respondents), from which it appeared that they had brought the suit to recover a moiety of certain mouzahs; that their claim had been decreed as to two of those mouzahs, but dismissed as to the rest; whereupon the defendant appealed to this Court as to the part of the claim which was decreed, and the respondents filed cross objections as to the part of the claim which was dismissed.

The affidavit then proceeded to say that, after the lower Court's judgment had been given, the plaintiffs applied for attested copies

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of the judgment and decree with an intention to file an appeal in this Court against that part of the decree which dismissed their claim; and that these copies were obtained on the 11th of February 1881, so that the last day for filing their appeal would have been the 11th of May following.

Meanwhile, however, the defendant (appellant) had also obtained copies of the decree, and he appealed to this Court on the 28th of April 1881, so that the respondents, instead of appealing themselves, filed cross objections to his appeal.

But what the respondents' affidavit does not state, and what it is essential that it should state, in order to entitle them to file a cross appeal now, is this: *that they were prepared to appeal on the 11th of May* 1881, *and would have appealed if the appellant had not done so.*

The Judges of this Bench some time ago, after consulting other Judges of the Court, came to this conclusion: that no leave to appeal should be given to a respondent who has filed cross objections, unless the Court is thoroughly satisfied, upon affidavit, that he was ready to appeal, and would have appealed within the proper time if the other side had not done so.

We are by no means satisfied of this in the present case. The respondents were well aware that they were bound to satisfy the Court upon this point; they had ample time for considering the form of their affidavit; and yet it is perfectly consistent with the affidavit now before us that they did not mean to appeal if the defendant had been content not to do so.

It is true that they might have taken copies of the decree with the intention of appealing; but it does not at all follow that, having obtained the copies and taken advice, they were prepared to appeal three months afterwards.

The counter-affidavit which has been made by the appellant's son distinctly states that, before this appeal was filed, the respondents proposed to the appellant not to file any appeal, and agreed not to do so, provided that the appellant did not.

Under these circumstances we think that we should be contravening the rule, which guides us in these cases, if we were to allow the respondents now to file an appeal.

Mr. Branson has applied to us to be allowed to file further affidavits to remedy the defect in his present one; but this would be, for obvious reasons, a very dangerous thing to allow. The respondents must have known the point perfectly well upon which they had to satisfy us; and they had ample time to bring before the Court all their available materials.

We think, therefore, that the appellant should be allowed to withdraw his appeal, as he has proposed to do, on payment of costs; and that the respondents should not be allowed to file a cross appeal.

Appeal withdrawn.

Before Sir Richard Garth, Knight, Chief Justice and Mr. Justice Macpherson.

RAM CHUNDER SAO (PLAINTIFF) *v.* BUNSEEDHUR NAIK (DEFENDANT)*

1883 *March* 30.

Evidence Act (I of 1872), s. 83—Measurement chittas.

Chittas made by Government for its own private use are nothing more than documents prepared for the information of the Collector, and are not evidence against private persons for the purpose of proving that the lands described therein are or are not of a particular character or tenure.

THE plaintiff was the purchaser at a sale for arrears of rent under Regulation VIII of 1819, of a certain patni taluk called lot Hurirampur.

In 1878 the plaintiff sued defendant to recover possession of one bigha 19 cottas of land as appertaining to that taluk, on the ground that he (the defendant) held the land at a rental of Rs. 10. This suit was, however, dismissed, as the defendant denied the relationship of landlord and tenant.

The plaintiff thereupon brought the present suit for possession of this land, and also for a declaration that it belonged to mehal lot Hurirampur.

The defendant admitted the proprietary right of the plaintiff in the mehal, but pleaded that the suit was barred under s. 13,

* Appeal from Appellate Decree No 1950 of 1881, against the decree of Baboo Radha Krishna Sen, Additional Subordinate Judge of Hugli, dated the 3rd August 1881, reversing the decree of Baboo Behari Lall Mullick, Munsiff of Haripal, dated the 27th September 1880.

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Civil Procedure Code, and that the land did not form part of lot Hurirampur, but was the lakeraj land of one Domon, from whose vendee he, the defendant, obtained it by purchase.

The Munsiff found, relying on certain Government chittas, that lot Hurirampur had been measured and resumed by Government in 1844; that the land in dispute appertained to mehal lot Hurirampur, and was not the lakeraj land of Domon, from whose vendee the defendant alleged that he had purchased; that the judgment passed in the rent suit contained no adjudication on the issues raised in the present case, and therefore s. 13 of the Civil Procedure Code did not apply: he therefore decreed the case in favor of the plaintiff.

The defendant appealed to the Additional Subordinate Judge of Hughli, who held that the plaintiff had not sufficiently proved that he or his predecessors had ever been in possession of the land, and that the Munsiff was wrong in relying on the chittas of 1844, as under s. 83 of the Evidence Act their accuracy could not be presumed, and that in any case they could not be used as conclusive evidence of title against a third party: he further found that the disputed land was lakeraj, and therefore allowed the appeal.

The plaintiff appealed to the High Court.

Baboo *Umbica Churn Bannerjee* for the appellant.

Baboo *Srinath Dass* for the respondent.

The judgments of the Court (GARTH, C.J., and MACPHERSON, J.) were as follows:—

GARTH, C.J.—I am of opinion that the chitta of 1844, which has been treated by the Subordinate Judge as no evidence against the present defendant, was not evidence, and that he was perfectly right in the view which he took.

As I understand, this was a chitta prepared by the Deputy Collector, with a view to resumption proceedings being taken, and the way in which that chitta was sought to be used in this case by the plaintiff, was that in that chitta the 1 bigha and 19 cottas of land in suit which has been found by the Subordinate Judge to be lakeraj, was not entered as lakeraj, but as rent-paying land.

I think that having regard to the object of the chitta, and to the way in which it was prepared, it cannot be made evidence under s. 83 of the Evidence Act.

The maps and plans, which are mentioned in that section, are, as it seems to me, *maps and plans made by the Government for public purposes;* I quite agree with the learned Judges, who decided the case of *Junmajoy Mullick* v. *Dwarkanath Mytee* (1) that a map or plan made by the Government for private purposes, or when the Government is acting otherwise than in a public capacity, is clearly not evidence.

Our attention has been directed to certain cases by the learned pleader for the appellant, in which Mr. Justice Jackson and some other learned Judges appear to have considered that jamabandi papers and maps prepared by Government with reference to lands, which they were holding in their khas possession as proprietors, were evidence under this section of the Act.

But I confess I cannot accede to that view; and if it should become necessary, I would refer the question, whether such documents are admissible, to a Full Bench.

I think it would be extremely dangerous to admit evidence of this kind under the guise of public documents. Such papers are merely prepared by the Government as landlords for the purposes of their estate, and they appear to me to be no more evidence against the tenants of that estate than similar documents would be, prepared by any other landlord.

I consider the chitta in this case to be nothing more than a document prepared for the information and guidance of the Collector; and that it is not evidence against private persons for the purpose of proving that the land described in it was or was not of a particular character or tenure. If the resumption proceedings had been put in, and it had been shewn that the defendant's ancestors claimed the land as lakeraj and were defeated, I quite agree that the chitta, coupled with the resumption proceedings, would have been admissible to prove that the land was not rent-free.

(1) I. L. R., 5 Calc., 287.

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But I think that the chitta *per se* is not evidence in this suit; and that the Subordinate Judge was right in so dealing with it.

The appeal will be dismissed with costs.

MACPHERSON, J.—I concur in dismissing the appeal. I think that the chitta, standing by itself, furnishes no proof that the particular land, which is the subject of this suit, was resumed by Government. If the plaintiff wished to prove the resumption of these lands, he ought to have filed the resumption proceeding itself.

Appeal dismissed.

FULL BENCH REFERENCE.

Before Sir Richard Garth, Knight, Chief Justice, Mr. Justice Mitter, Mr. Justice McDonell, Mr. Justice Prinsep, and Mr. Justice Wilson.

1883 *March* 9.

MAHOMED ALI KHAN AND OTHERS (PLAINTIFFS) *v.* KHAJA ABDUL GUNNY AND OTHERS (DEFENDANTS.)*

Possession—Dispossession—Adverse Possession—Presumption—Onus Probandi—Limitation—Joint owners, Adverse possession between.

Under the former Limitation Act the cause of action, and under the present law the event from which limitation is declared to run, must have occurred within the prescribed period, and it lies on the plaintiff to show this. Accordingly, where the suit is for possession, and the cause of action is dispossession, the plaintiff is bound to prove possession and dispossession within twelve years.

Possession is not necessarily the same thing as actual user.

When land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes, at such a time and under such circumstances that that state naturally would, and probably did, continue till within twelve years before suit, it may properly be *presumed* that it did so continue, and that the previous possession continued also until the contrary is proved.

Such a presumption is in no sense a conclusive one. Its bearing upon each particular case must depend upon the circumstances of that case.

Many acts which would be clearly adverse, and might amount to dispossession as between a stranger and the true owner of land, would, between joint owners, naturally bear a different construction.

* Full Bench Reference made by Mr. Justice Mitter and Mr Justice Norris, dated the 14th August 1882, in appeal from Appellate Decree No. 2378 of 1880.

THIS case was referred to a Full Bench by Mr. Justice Mitter and Mr. Justice Norris, on the 14th August 1882, with the following opinion :—

"The facts of this case are briefly as follows: At the time of the permanent settlement, Pergunnah Attea was divided into the following zemindaries, the *towzi* numbers of which are 10, 11, 12, 16, 5031, 5032, 5033, 5034, 5035, 5151, 5152 and 5153. The lands of these zemindaries were separate and distinct, with the exception of a large area of jungle land consisting of 491 mouzahs, which went by the name of Araipara. The dispute in this case relates to 50 khadas of land alleged by the plaintiffs to lie within one of these mouzahs, *viz.*, Kazlah. The plaintiffs in this case are the proprietors of some of the zemindaries mentioned above. They allege that they were in possession of the disputed lands, by receipt of their share of the rent derivable from the sale of timber, &c., *i. e.*, such rents as are recoverable from jungle lands. Then they further allege that gradually a portion of the disputed lands was reclaimed and ryots were settled upon it; but that the defendants, who are the owners of one of these zemindaries, *viz*, 5032, dispossessed them on the 12th April 1868. The defendants, alleging that the land in dispute was not in Kazlah, but in mouzah Narina Alukdia, exclusively appertaining to their zemindari No. 5032, and further alleging that they have been in possession of the disputed lands for more than twelve years, amongst other pleas, pleaded limitation as a bar to the plaintiffs' claim. The Court of first instance dismissed the plaintiffs' suit on the plea of limitation as well as on the merits. On appeal, the District Judge is of opinion that the decision of the Court of first instance, on the merits of the case, was not correct. He says that, if it had not been for the fact that the claim was barred by limitation, he would have deputed an Amin to hold a local investigation upon the question, whether the land in dispute appertains to Kazlah or to mouzah Narina Alukdia. On the plea of limitation, he finds that Kazlah was thaked in 1859 as the joint property of the proprietors of all these zemindaries and as in their joint possession; but that the plaintiffs have utterly failed to prove their possession of the land in dispute within twelve years. Upon these findings of fact, the

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District Judge has dismissed the plaintiffs' claim as barred by limitation (1).

(1) The following is that portion of the District Judge's judgment which bears on the question of limitation: "I will now come to the issue as to limitation. In suit No. 61 (for about two-thirds of the whole claim) the plaint was filed on the 24th August 1878, in suit No. 12 it was filed on the 27th May 1879, in suit No. 639 on the 6th August 1879. In all, the cause of action, namely, forcible, fraudulent, unjust, and illegal dispossession, is said to have accrued on the 12th April 1868, so that by the admission of the plaintiffs, the earliest suit is within one year and eight months of being barred by possession admittedly adverse, and the latest suit is within eight months and a few days of being so barred. As to a 'forcible' dispossession, which apparently alludes to some specific act, there is not a word of evidence tendered. It clearly rests with plaintiffs to prove that a possession, which they admit to have been continuously adverse for upwards of ten years before the bringing of the first suit, did, during the preceding one year and eight months, not exist at all, or did not exist in adverse form: they must prove that a state of things different from what they admit to have existed for so many successive years did, as defendants allege it, not exist at any time during the two previous years On the inability of the plaintiffs to do this, I concur with the lower Court. I also concur with the lower Court in finding that defendants have not proved the lands in dispute to appertain to their separate zemindari.

"Plaintiffs are for the most part large and wealthy zemindars, by no means slow to assert their rights, yet they admit that they have unaccountably slumbered over these rights for upwards of ten years. Plaintiffs, mainly for the purpose of proving their possession (joint with defendants) prior to 1275 (1868), rely on an ijara kabuliat, which they have filed This document the lower Court has discredited; but without looking to its genuineness, it is sufficient to say that it is dated 1271 (1864) and was for 1271, 1272, 1273, and 1274 (1864—1867); and that it, of itself, forms no evidence whatever that possession followed upon it, or continued into 1275 (1868). The plaintiffs also rely on some chalans filed not in suit No. 61, the heaviest and most important one, but in suit No. 12 which was commenced many months afterwards. They purport to have been given by Ram Jiban Joypal, one of the ijaradars, and are for rent of 1271, 1272, 1273, and 1274 (1864—1867); but in his evidence this man states that his ijara only extended up to 1272 (1865), and that he never went to Kazlah after 1272. His subsequent answers to the contrary, when pressed by plaintiffs, appear to me deserving of no weight. Plaintiffs in suit No. 61 examined seven witnesses, and in No. 12 they examined three witnesses. These witnesses do not appear to know anything about Kazlah, a very small

"It is now contended before us that, having regard to the nature of the land in dispute, which was jungly waste and uncultivated at the time of the Thakbust measurement, the plaintiffs' claim should not be thrown out as barred by limitation, unless the defendants prove adverse possession for more than twelve years. If it were an admitted fact that the land in dispute is still unclaimed, we have no doubt that this contention would be right. But it is admitted that a portion of the land in dispute is now under culti-

fraction of the whole group, although some of them assert that defendants, by settling ryots and clearing the lands, had dispossessed them.

"There can be no doubt that limitation in such a suit as this runs from the commencement of an adverse possession The plaintiffs have distinctly alleged (and this position is admitted by their vakeel), that the exclusive actual possession of defendants has throughout its existence been of an adverse character. It is for them then to prove that this sort of possession only commenced within the twelve years prior to their suit They allege that it commenced in the month of Bysak 1275 (April 1868.) They have quite failed to prove that allegation.

"I find that the plaintiffs have failed to discharge the onus on them, and to prove even *primâ facie* that the adverse possession of the defendants commenced within twelve years of any of these suits. There is no evidence that clearances and settlement of the ryots began only in 1275; they admittedly existed in 1275, and the evidence is to the effect that they existed before that. Moreover, the plaintiffs have set up a case of actual possession and enjoyment by the receipt of rents for jungle produce down to 1275. They therefore cannot, as they would wish to do, plead that this is a case in which possession must be taken to go with the right.

"Plaintiffs' vakeels have relied much on a ruling by MACPHERSON and MOORE, JJ., *Shurfunnissa Bibee Chowdrain* v. *Koylash Chunder Gungopadhya* (1), but that decision only defines the time at which possession by a co-sharer is to be held to become 'adverse.' It does not in any way say that a co-sharer cannot possess adversely, or that adverse possession by a co-sharer for twelve years is not a complete bar.

"Had I not held that plaintiffs were barred by limitation, and that, therefore, the appeals must be dismissed, I should have held that they, as ijmali sharers, were entitled to the joint possession they claim; and that the defendants having in no way established that they had expended a single rupee on reclamations, are in no way, in equity, entitled to defeat that right of the plaintiffs and to hold exclusive possession of even the cleared portion of the lands in suit. I should also have held that there was no private arrangement proved, whereby the other sharers consented to allow the defendants to hold exclusive possession of the lands in suit."

(1) 25 W R, 53.

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vation. Having regard to this fact, the question raised before us, in our opinion, becomes one of peculiar difficulty, so far as the cultivated lands are concerned. The decisions bearing upon this point—*Nawab Nazir Sidhee Ali Khan* v. *Womesh Chunder Mitter* (1); *Boolee Singh* v. *Hurobuns Narain Singh* (2); *Lall Singh* v. *Baboo Modhoosoodun Roy* (3); *Bunseeroonnissa Chowdhrain* v. *Rajah Leelanund Singh* (4); *Syud Ameer Ali* v. *Maharanee Inderjeet Kooer* (5); *Gossain Doss Koondoo* v. *Siroo Koomaree Debia* (6); *Niljaree* v. *Mujeeboollah* (7); *Shaikh Ozeer Ali* v. *Shaikh Mukbool Ali* (8); *Kalee Narain Bose* v. *Anund Moyee Goopta* (9); *Gokool Kristo Sen* v. *David* (10); *Lutchoo Khan* v. *Foley* (11); *Mahomed Kobeer* v. *Abdool Azeem* (12); *Khoda Newaz Chowdhry* v. *Brojendro Coomar Roy Chowdhry* (13); *Koomar Runjit Singh* v. *Schoene Kilburn & Co.* (14); *Radha Gobind Roy* v. *Inglis* (15); *Kally Churn Sahoo* v. *Secretary of State* (16); *Mahomed Ibrahim* v. *Morrison* (17); *Mano Mohun Ghose* v. *Mothura Mohun Roy* (18); *Pandurang Govind* v. *Bal Krishna Hari* (19); *Maharajah Koowur* v. *Baboo Nund Loll Singh* (20)—appear to us to be contradictory. We therefore refer the following question to the decision of the Full Bench:

"It being assumed by the lower Appellate Court, for the purpose of deciding the question of limitation, that the land in dispute at the time of the Thakbust was jungle and in the joint possession of all the zemindars of Pergunnah Attea, including the plaintiffs' predecessors in title, and it being found that the plaintiffs have failed to prove their possession of the disputed land, which is partly jungle and partly under cultivation, within twelve years from the date of suit, whether the plaintiffs' claim is barred by limitation."

(1) 2 W. R., 75.
(2) 7 W. R., 212.
(3) 8 W. R., 426.
(4) 14 W. R., 135.
(5) 15 W. R., 43.
(6) 12 B. L. R., 219; 19 W. R., 102.
(7) 19 W. R., 209.
(8) 19 W. R., 282.
(9) 21 W. R., 79.
(10) 23 W. R., 413.
(11) 24 W. R., 273.
(12) 24 W. R., 315.
(13) 24 W. R., 417.
(14) 4 C. L. R., 390.
(15) 7 C. L. R., 364.
(16) I. L. R., 6 Calc., 725.
(17) I. L. R., 5 Calc., 36.
(18) I. L. R., 7 Calc., 225.
(19) 6 Bom. H. C. A. C., 125.
(20) 8 Moore's I. A., 190 at p. 220.

Mr. *Evans*, Baboo *Srinath Das*, Baboo *Jogesh Chunder Roy*, and Moonshi *Serajul Islam* for the appellants.

Baboo *Chunder Madhub Ghose*, Baboo *Rash Behari Ghose*, and Baboo *Kaloda Kinker Roy* for the respondents.

The following judgments were delivered :—

The judgment of MITTER, MCDONELL, PRINSEP, and WILSON, JJ., was delivered by.

WILSON, J.—In these suits the plaintiffs sought to have their rights declared to shares in 50 khadas of land, and to be put in possession of them jointly with the defendants. The defendants denied the plaintiffs' title and also pleaded limitation. The lower Appellate Court has decided in favor of the plaintiffs on the question of title, holding them entitled to be put into possession, but for limitation. It has, however, held that their claim is barred by limitation. The question before us is whether the rule of limitation has been correctly applied.

The facts found or admitted, so far as they are material for the present purpose, seem to be these : The plaintiffs and the defendants have a good title to the lands in question jointly. At the date of a Thakbust in 1859 they were in joint possession. The whole of the lands were then jungle, yielding, however, some kind of profit, which has been variously described.

At some time or times subsequent to that date, but more than ten years ago, a portion of the lands was brought under cultivation, and of the lands so reclaimed the defendants have been in possession from the time of their reclamation. It would appear that the amount reclaimed is some 10 or 12 khadas out of 50, though perhaps what the District Judge says on that point does not amount to an actual finding.

With regard to the law, the District Judge says : "It clearly rests with plaintiffs to prove that a possession, which they admit to have been continuously adverse for upwards of ten years before the bringing of the first suit, did, during the preceding one year and eight months, not exist at all, or did not exist in adverse form. They must prove that a state of things different from what they admit to have existed for so many successive

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years did, as defendants allege it, not exist at any time during the two previous years." And again: "The plaintiffs have distinctly alleged (and this position is admitted by their vakeel) that the exclusive actual possession of defendants has throughout its existence been of an adverse character. It is for them to prove that this sort of possession only commenced within the twelve years prior to their suits." And he concludes: "I find that the plaintiffs have failed to discharge the onus on them, and to prove even *primâ facie* that the adverse possession of the defendants commenced within twelve years of any of these suits."

It appears to us that the application of the law of limitation to cases, such as the present, requires considerable care.

There is no doubt as to the general rule: That under the former Limitation Act the cause of action, and under the present law the event from which limitation is declared to run, must have occurred within the prescribed period, and that it lies on the plaintiff to show this. Accordingly, where the suit is for possession, and the cause of action is dispossession, it has more than once been held by the Privy Council that the plaintiff is bound to prove possession and dispossession within twelve years—*Maharajah Koowur Singh* v. *Nund Lal Singh* (1); *Raja Saheb Perhlad Sein* v. *Budhu Singh* (2); *Beer Chunder Jobraj* v. *Deputy Collector of Bhullooah* (3).

We think further that as a general rule the plaintiff cannot, merely by proving possession, at any period prior to twelve years before suit, shift the onus to the defendant. In the case already cited, *Maharajah Koowur Singh* v. *Nund Lal Singh* (1), the plaintiff had adduced evidence to show possession earlier than twelve years before suit; but the Privy Council treat it as immaterial, saying at page 220: "The lands in question may have been part of mouzah Gopalpur, and, as such, may have been enjoyed by his (the plaintiff's) ancestor, and yet he may have lost, by lapse of time, his right to recover them." To this extent we are unable to concur in the view indicated by the Chief Justice in *Kally Churn Sahoo* v. *The Secretary of State for India* (4).

(1) 8 Moore's I. A., 199, at p. 220.

(2) 12 Moore's I. A., 275, 337 · S. C. 2 B. L. R. P. C., 111.

(3) 13 W. R., P. C., 23.

(4) I. L. R., 6 Calc., 725.

But possession is not necessarily the same thing as actual user. The nature of the possession to be looked for, and the evidence of its continuance, must depend upon the character and condition of the land in dispute. Land is often either permanently or temporarily incapable of actual enjoyment in any of the customary modes as by residence or tillage or receipts of a settled rent. It may be incapable of any beneficial use, as in the case of land covered with sand by an inundation; it may produce some profit, but trifling in amount, and only of occasional occurrence as is often the case with jungle land. In such cases it would be unreasonable to look for the same evidence of possession as in the case of a house or a cultivated field. All that can be required is that the plaintiff should show such acts of ownership as are natural under the existing condition of the land, and in such cases, when he has done this, his possession is presumed to continue as long as the state of the land remains unchanged, unless he is shown to have been dispossessed.

Lands again may by natural causes be placed wholly out of reach of their owner; as in the case of diluvion by a river. In such a case, if the plaintiff shows his possession down to the time of the diluvion, his possession is presumed to continue as long as the lands continue to be submerged. *Kally Churn Sahoo* v. *Secretary of State for India* (1); *Mono Mohun Ghose* v. *Mothura Mohun Roy* (2).

When lands which have been in such a condition as to be incapable of enjoyment in the ordinary modes are reclaimed and brought under cultivation, the change is in many instances gradual and difficult of observation while in progress. Diluviated land may take years to reform. Jungle land is often brought under cultivation furtively by squatters clearing a patch here and a patch there at irregular intervals of time. So that it may be a matter of extreme difficulty to prove as to any piece of land, the exact date at which its condition became altered. And as the plaintiff, who has complied with the conditions we have indicated, is in the absence of dispossession presumed to continue in possession as long as the state of the land remains

(1) I. L. R., 6 Calc., 725. (2) I. L. R., 7 Calc., 225.

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unchanged, it is essential to inquire on whom the burden of proof of the date of the change lies.

The true rule appears to us to be this: That where land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes at such a time, and under such circumstances that that state naturally would, and probably did, continue till within twelve years before suit, it may properly be presumed that it did so continue, and that the plaintiff's possession continued also, until the contrary is shown. This presumption seems to us to be reasonable in itself, and in accordance with the legal principles now embodied in s. 114 of the Evidence Act.

It remains to consider the case of *Radha Gobind Roy* v. *Inglis* (1) decided by the Privy Council. We do not understand that case as establishing the broad proposition contained in the head note, which would be in conflict with the earlier decisions of the same tribunal. The land in dispute in that case had formed part of the bed of a bhil or lake; the title to the bhil and its bed was found to be in the plaintiff, and he had been in possession so long as the land was covered with water. The bhil gradually dried up and the defendant occupied the land so formed. The date of the drying up of the land and of its occupation by the defendant were in controversy, but these things had certainly happened recently. Their Lordships, having disposed of the other questions which were raised, say: "The question remains, whether the disputed land had or had not been occupied by the defendant for twelve years before the suit was instituted, so as to give him a title against the plaintiff by the operation of the Statute of Limitation. On this question, undoubtedly the issue is on the defendant. The plaintiff has proved his title; the defendant must prove that the plaintiff has lost it by reason of his, the defendant's, adverse possession. And immediately below it is said: "The Subordinate Judge does not appear to have had his attention directed to the very important question when the new land formed." The present case is in its facts closely

(1) 7 C. L. R, 364.

analogous to that case; and the view which we take of the law certainly accords with the decision of the Privy Council.

The presumption of which we have spoken is in no sense a conclusive one. Its bearing upon each particular case must depend upon the circumstances of the case; and it is always liable to be rebutted by evidence. But having regard to the time at which the whole land was jungle, and the comparatively small quantity which up to the time of suit seems to have been cleared, we think that it ought to be considered in this case together with all the evidence; and we remand the case to the lower Appellate Court in order that the question of limitation may thus be again considered.

We desire to abstain from saying anything that might seem to fetter the judgment of the learned Judge in dealing with the question upon the whole materials before him; but there are two matters which may have an important bearing upon the case, and to which we think it right to draw attention. In the first place the nature of the profit derived by the joint owners from the land as jungle should be considered. If it should be that they were in receipt of a settled rent, regularly paid like an agricultural rent, the presumption in question might have little, if any, bearing on the case; if the profit was of a different description, the result might be materially different. Secondly, in considering any transaction prior to the time from which the plaintiff admits the defendants' possession to have been adverse, it should be borne in mind that the case is one between joint owners, and many acts which would be clearly adverse and might amount to dispossession as between a stranger and the true owner of land, would, between joint owners, naturally bear a different construction.

GARTH, C.J.—I am sorry that I cannot concur entirely with the view which has been taken of the law by my learned brothers.

So far as the result of this particular case is concerned, and the order which my learned brothers have made in remanding it to the Court below, I am quite content to defer to their judgment. It may be, and I trust that in the generality of cases it will be, that the difference of opinion which exists between us may not

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tend to much diversity of practice. But what I cannot regard as sound law, (although I shall of course dutiously accept it after this judgment as our rule of action), is the principle which has been laid down by the rest of the Court upon the subject of presumption.

We are agreed that under the old, as well as the present, law of limitation, the plaintiff is bound in cases of this nature to prove a possession and a dispossession within twelve years before suit; and we are also agreed, as I understand, that this proof need not always consist of evidence of acts of possession on the one hand, or of the act of dispossession on the other.

Thus it is admitted that in the case of jungle land, or of land covered by water, the Court may, and generally should, presume, in the absence of evidence to the contrary, that a possession enjoyed by the plaintiff before the twelve years, has continued until within the 12 years; and in the same way, when the plaintiff has proved his possession within the twelve years, and the defendant has been afterwards found upon the land, the act of dispossession by the defendant may be properly inferred.

But what I do not understand, and what I confess I cannot bring myself to believe is, that there exists in this country an arbitrary rule of law, applicable to *jungle land* or *to land covered by water*, or in fact *to land of any particular kind* or *character*, which does not also apply, according as the circumstances of each case may render it necessary, *to land of all kinds*.

I know of no law in this country, whether statutory or otherwise, which lays down or justifies such an arbitrary rule; the Privy Council, so far as I am aware, have never suggested such a rule, and it seems to me that the true solution of the question is to be found in the well-known principle of law, which, so far as I know, prevails, and may be applied here as properly and beneficially as it is in England, that a seisin or possession of land, which is once proved to exist in a particular person, may be, and often should be, presumed to continue until the contrary is shewn.

This is only one branch of the still more general rule, which is laid down in s. 114 of the Evidence Act, that a state of things once proved to exist is presumed to continue—(See Taylor on Evidence, s. 98 and s. 123, Edition of 1848.) The

particular rule, as applied to seisin or possession of land, is thus shortly laid down by Mr. Best in his book on Evidence, page 505: "Where seisin of an estate has been shown, its continuance will be presumed."

Of course this is only a disputable presumption, and one which is entitled to more or less weight, according to the circumstances of each case; and it must be applied at all times with discretion and caution. Where land is actually used and occupied, and the occupier, whoever he may be, is well known in the neighbourhood, there is rarely any occasion to resort to presumption.

And where the Court has every reason to believe, that the plaintiff would have no difficulty in proving by direct evidence a possession, if it had been really enjoyed, it would naturally attach little or no weight to any rule of presumption. But if it is shewn on the other hand, even in the case of cultivated land or house property, that the plaintiff, who had formerly been in undisputed evidence, had died, or had left the country, or for other reasons was unable, or unlikely to be able, to produce actual evidence of possession, the presumption might then legitimately be resorted to, and entitled to more or less weight according to circumstances.

This I understand to be the view of Mr. Justice Melvill in the case of *Pandurang Govind* v. *Bal Krishna Ilari* (1) in which, after affirming what we all admit to be the law, that the burthen of proof in cases of this kind is upon the plaintiff, that learned Judge says: "The burden of proof being upon the plaintiff, what is he required to prove? Simply, that the cause of action accrued within the period of limitation made applicable to the suit. This is by no means equivalent to saying that a plaintiff in an action of ejectment must prove that he has been in possession within twelve years. He may not have been in possession within twelve years, and yet the cause of action may have accrued within that period. If a man buy a piece of open ground, he is not bound to enclose it or to build upon it, or formally to take possession of it; nor, if he do formally take possession of it, is he bound by subsequent acts to proclaim the continuance of his possession. So long as the land remains unoccupied, his rights are not interfered with,

(1) 6 Bom. H. C. A. C., 125 at p. 128.

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and he is not called upon to assert them. He has no cause of action, and there is no person whom he could sue. His cause of action accrues when another person takes possession of the land, and not before. If he has omitted to take possession of the land himself, he may not be able to treat the intruder as a trespasser; but he can bring an action to eject him at any period within twelve years from the date of the intruder's occupation of the land." I do not understand these expressions to apply exclusively to waste land, or to land of any other special character; but to all cases where the production of direct evidence of possession is either difficult or impossible.

I observe that Mr. Justice Melvill in a later case, *Moro Desai* v. *Ramchandra Desai* (1) seems to consider that the Privy Council in the case of *Radha Gobind Roy* v. *Inglis*, had proceeded upon a view of the law, which was inconsistent with some earlier decisions of that learned tribunal, and also with what had been the practice in the Indian Courts for many years.

I am sorry to say that I myself fell into a similar mistake, if it was a mistake, in the case of *Kally Churn Sahoo* v. *The Secretary of State for India* (2) which has been alluded to in the judgment of my learned brothers. I supposed, but on a closer examination of the cases I think I erroneously supposed, that there was some difficulty in reconciling their Lordships' view in *Radha Gobind's* case with that which they had laid down in the case of *Maharajah Koowur Singh* v. *The Secretary of State for India* (3) and other cases alluded to by my brother Wilson.

I endeavoured in the case of *Kally Churn Sahoo* to explain this apparent inconsistency, but I think I was wrong, and for this reason: this last case, as I now believe, proceeded upon the well known rule to which I have alluded, that a title and seisin when once established must be presumed to continue in those cases at any rate where there is no direct evidence of possession, and where such evidence is, from the nature of the case, either difficult or impossible to obtain. In *Radha Gobind's*

(1) I. L. R., 6 Bom., 508, at p. 510.
(2) I. L. R., 6 Calc., 725.
(3) 8 Moore's I. A., 199.

case the defendants, who apparently had first brought the bed of the bhil in question into cultivation, were presumably better able than the plaintiffs to prove when and how the cultivation had commenced; and the case, when one looks at the circumstances of it, was just one of those in which the legal presumption with which I have been dealing might be usefully and properly applied.

On the other hand, in the case of *Maharajah Koowur Singh*, we find that so far from evidence of possession not being forthcoming, a considerable body of evidence was adduced on both sides. No less than eight witnesses were examined on that subject for the plaintiff, and nine or ten for the defendant, and their Lordships, after considering that evidence and the balance of probabilities on either side, decided in favor of the defendant. It is obvious that this was not a case in which the sort of presumption, which I have described, could properly or reasonably have been applied, and I may observe before leaving the consideration of that case that I do not read one part of their Lordships' judgment in the sense that has been attributed to it by my learned brothers—I allude to the sentence: "The lands in question may have been part of mouzah Gopalpur, and, as such, might have been enjoyed by his ancestor, and yet he may have lost by lapse of time his right to recover them." I do not understand this to mean, and upon looking at the context I think it clearly does not mean, that in the view of their Lordships the plaintiff's ancestor *had ever in fact been in possession*. They meant to say that even if he had been in possession, he might have lost, by lapse of time, his right to recover the property.

And I think also that the two other cases decided by the Privy Council, *Rajah Sahib Perlhad Sein* v. *Budhoo Singh* (1), and *Beer Chunder Jobraj* v. *Deputy Collector of Bhullooah* (2), must be looked at in the same light. In both of those cases we find that evidence was called on both sides; and that their Lordships came to a distinct conclusion upon that evidence. There was no necessity, therefore, and no reason, so far as I can see, for acting upon the principle for which I am now contending.

(1) 12 Moore's I. A., 275: S. C, 2 B. L. R. P. C., 111.
(2) 13 W. R. P. C., 25.

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But in *Radha Gobind's* case there was reason for acting upon that principle, and it appears indeed to have been the first case, amongst all those to which our attention has been called during the argument, in which it became necessary for their Lordships to resort to that principle. It will be found that in the generality of cases of this kind, the parties as a rule can and do produce more or less direct evidence of possession, and when they do so, the Court naturally and properly acts upon that evidence without resorting to any principle of presumption.

For these reasons I hope, as I stated in the first instance, that the difference which exists in this case between my learned brothers and myself will prove to be one rather of principle than of practice.

APPELLATE CIVIL.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Macpherson.

1883 *April* 17.

ANUND CHUNDRA MUNDUL AND ANOTHER (DEFENDANTS) *v.* NILMONY JOURDAR (PLAINTIFF).*

Hindu Law—Inheritance—Descent of lands purchased by widow out of income of life-estate.

Land purchased by a Hindu widow with money derived from the income of her life-estate passes, when undisposed of by her, to the heirs of her husband as an increment to the estate, and not to her heirs as property over which she had absolute control.

Baboo *Mohiny Mohun Roy* for the appellants.

Baboo *Shoshee Bhusun Dutt* for the respondent.

THE facts of this case sufficiently appear from the judgment delivered by

MACPHERSON, J.—The question raised in this appeal is, whether land purchased by a Hindu widow with money derived from the income of her life-estate, passes, when undisposed of by her, to

* Appeal from Appellate Decree No 2003 of 1881, against the decree of Baboo Upendro Chunder Mullick, Subordinate Judge of Jessore, dated the 27th June 1881, affirming the decree of Baboo Behari Lall Mukerjee, Munsiff of Jhineeda, dated the 14th February 1881.

the heirs of her husband as an increment to the estate, or to her heirs as her own property over which she had absolute control.

It arises in this way: Gourmoni, a widow of one of three brothers, inherited her husband's one-third share of the family property. Being dispossessed by the other two brothers, she obtained against them decrees both for possession and for mesne profits, and in execution of the latter brought to sale and herself purchased their two-third share of the same property. Both Courts have found, and the fact is not now disputed, that this was an acquisition made out of the income of the property, in which she held a widow's life-estate, the purchase money representing the usufruct of which she had been wrongfully deprived. Gourmoni was, however, under the necessity of borrowing money to carry on the litigation alluded to, and the lenders, who are the first two defendants in the case, obtained against her a decree for the amount lent. This they executed after her death, not against the heirs of her husband, but against those who were her heirs and who would take the property if it was her own, by attachment and sale of the two-third share which Gourmoni had bought, and they became themselves the purchasers. The plaintiff claims as purchaser prior to the last execution sale, from two of the three reversionary heirs, all of whom are parties to the suit. The contest, therefore, is between him as representing the reversioners, the undoubted owners of the one-third share which Gourmoni took as widow of her husband, and the first two defendants claiming under their purchase at the execution sale subsequent to the death of Gourmoni. It may be, as appellants' pleader contends, that the law is unsettled as to the power of a Hindu widow to alienate, beyond her own life interest, immovable property purchased by her from the income of her life-estate; but it is unnecessary to determine this, as no question of any such alienation here arises. The point was discussed, though not decided, in the case of *Hunsbutti Kerain* v. *Ishri Dutt Koer* (1). It may be noted that though both the learned Judges, before whom that case came, entertained doubt as to the particular question before them, they seemed to have no doubt that such property, when undisposed of by the widow,

(1) I. L. R., 5 Calc., 512.

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passes on her death not as stridhan to her heirs, but to the heirs of her husband as an increment to the parent estate. And whatever her power of alienation may be, it seems clear that such is the law as regards the succession to property of which she made no disposition, the presumption being, in the absence of proof of intention to sever it from the bulk of the estate and appropriate it to herself, that she intended it to be an accretion to her husband's property and it would pass as such. This was the principle followed by the Privy Council in the case of *Gouda Koer* v. *Kooer Oodey Singh* (1). That was, it is true, a case governed by the Mitakshara law, but there seems, in this respect, no ground for distinction between the Mitakshara and the Dayabhaga. The case of *Chundrabulee Debia* v. *Brody* (2) (a Bengal case) is also a direct authority on the point. It was there held that savings made by a widow, while enjoying the widow's estate, and undisposed of by her, would form part of the estate and go with it to the next heirs of her deceased husband. In that case the holder of a decree against a Hindu widow attempted after her death to take out execution for certain mesne profits which had been decreed to her, and which represented the usufruct of her estate. He was opposed by the heirs of her husband, and it was held that he could not execute unless he showed that the debt for which he held a decree was contracted by the widow for legal necessity and for the benefit of the estate—a question which in that stage of the case (*viz.*, in the course of execution proceedings) could not be decided. That decision was followed in the case of *Chowdry Bholanath Thakoor* v. *Bhagabutti Deyi* (3), to which the Mitakshara law was applicable, but this having been reversed by the Privy Council (*Bhagabutti Deyi* v. *Chowdry Bholanath Thakoor*) (4), is no authority. The remarks, however, of their Lordships in that case tend to show that, if the widow had taken, as supposed by this Court, a widow's estate, and not, as they held, a life-estate under a family settlement with power to appropriate the profits, the decision as to the succession to the property

(1) 14 B. L. R., 159.
(2) 9 W. R., 584.
(3) 7 B L. R., 93: 15 W. R, 63.
(4) L. R., 2 I. A., 256.

acquired by the widow out of the savings of the husband's estate would not have been wrong.

The only authority cited as supporting a contrary view is the case of *Soorjeemoney Dossee* v. *Dinobundhoo Mullick* (1), where a widow was declared *absolutely entitled in her own right* to all such interest and accumulations as since the death of her deceased husband had arisen from the one-fifth part of certain accumulations which she had before been declared entitled to hold and enjoy as a Hindu widow in the manner prescribed by Hindu law. There, however, no question was raised as to the succession to the property on the widow's death, and the reversionary heirs of the husband were no parties to the case. On that, among other grounds, the Privy Council refused to treat that case as an authority in the case which I have before quoted of *Gonda Koer* v. *Kooer Oodey Singh* (2). Another ground certainly was that the case of *Soorjeemoney Dossee* v. *Dinobundhoo Mullick* (1), was governed by law current in Bengal, while the Mitakshara law applied to the other case, but as I have already said no distinction has, in this respect, been pointed out in the law applicable to the two schools.

It has been broadly contended, that as the widow had in her life-time absolute control over the income of her husband's estate, that income and whatever property she acquired with it was her stridhan or separate property, and must devolve as such. It is open to doubt whether such property is, properly speaking, stridhan at all, but on the principle already enunciated it could only become so, or at least be regarded as her property, when she had shown an intention to appropriate it to herself and to sever it from her husband's estate. This answer therefore is sufficient, that whatever disposing power she may have had over such property, (and this it is not necessary in the present case to decide) she made no disposition and showed no intention of treating it as her separate property; the presumption therefore already alluded to arises, that she intended it to be an accretion to her husband's property, and it would pass as such to his heirs.

(1) 9 Moore's I. A., 123. (2) 14 B. L. R., 159.

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As, therefore, the plaintiff represents the reversioners, and the appellants by their purchase acquired no title, I would dismiss the appeal with costs.

GARTH, C.J.—I quite agree that this appeal must be dismissed. The case may seem a very hard one upon the defendants Nos. 1 and 2. They appear to have advanced their money to Gourmoni in good faith for the protection and recovery of her share of the property, and they might fairly look to that property for the payment of their advances.

And if they had taken the proper course, I think they might have done so. After obtaining a decree against Gourmoni they might either, if they had used due diligence, have enforced it by execution during her life, or they might have proceeded against the property in the hands of the reversionary heirs after her death.

But for some unaccountable reason, they chose to execute their decree, and to sell the property in execution, as belonging to Gourmoni's sisters, who had nothing whatever to do with it.

They therefore took nothing by their purchase under that execution, and they must, in this suit at least, take the consequences of their ill-advised proceedings.

It is possible that they may still have a remedy against the property in the hands of the reversionary heirs, if they are not barred by limitation; but in this suit they must fail.

The appeal is dismissed with costs.

Appeal dismissed.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Macpherson.

HARANUND MOZOOMDAR (PLAINTIFF) *v.* PROSUNNO CHUNDER BISWAS AND OTHERS (DEFENDANTS.)*

1883 *March* 30.

Misjoinder—Parties—Suit to recover property sold in execution of decree.

Certain properties were sold to *A* by private contract. Subsequently the properties were attached in execution of a decree against *A's* vendors and sold in execution to various purchasers. *A* instituted a suit against his vendors, the decree-holders, and the purchasers, to set aside the execution sale.

Held, that the suit was not defective by reason of misjoinder of parties.

Rajaram Tewari v. *Luchman Prasad* (1) distinguished.

THE plaintiff in this case alleged that the defendants 4 to 6 were the owners of certain lands, and that on the 1st Bysack 1286 (13th April 1879) they sold these lands to him; that after sale the defendants 1 to 3, in execution of a decree against the defendants 4 to 6, attached the lands and put them up to sale; that the plaintiff preferred a claim which was disallowed, and the properties were sold and purchased separately by the defendants 7 to 11. The plaintiff now sued to set aside the sale in execution, and to establish his right to the lands by virtue of the conveyance to him of the 1st Bysack 1286. The defendants 7 to 11 contended that the properties having been separately purchased at auction by different individuals, the plaintiff should have brought separate suits for the property purchased by each of them, and that the suit was wrongly framed. Both the lower Courts, on the authority of the case of *Rajaram Tewari* v. *Luchman Prasad* (1), dismissed the suit.

The plaintiff appealed to the High Court.

Baboo *Mohini Mohun Roy* for the appellant.

Baboo *Rajendro Nath Bose* for the respondents.

* Appeal from Appellate Decree No. 1981 of 1881, against the decree of F. W. U. Peterson, Esq., Judge of Jessore, dated the 12th August 1881, affirming the decree of Baboo Prosunno Coomar Ghose, Munsiff of Magoora, dated the 24th January 1881.

(1) B. L. R. Sup. Vol. 731: 8 W. R., 13.

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The judgment of the Court (GARTH, C.J., and MACPHERSON, J.) was delivered by

GARTH, C.J.—We think it clear that the lower Courts have made a mistake in this case.

They have dismissed the suit upon the ground that there was a misjoinder of defendants; or, in other words, that instead of bringing one suit against all the defendants, Nos. 7 to 11, who purchased at the execution sale different portions of the property in question, they ought to have brought five different suits, one against each of those defendants.

The plaintiff's case is, that before the execution sale, under which the defendants 7 to 11 purchased these properties, they were purchased by him from the execution-debtors by private contract, and that he took possession of them. These properties were afterwards attached in execution under a decree obtained against the judgment-debtors by the defendants Nos. 1 to 3, whereupon the plaintiff preferred a claim to the whole property in the execution proceedings, but the Court decided against him; and so it was sold and bought by the defendants 7 to 11.

The plaintiff then brought this suit against the defendants 7 to 11 to set aside the execution sale, and to establish his right to the property under the private sale to himself; and as the judgment-creditors and the judgment-debtors were both interested in the subject of the suit, he very properly made them parties.

The only point raised by the defendants upon the merits is, that the alleged sale to the plaintiff was not *bonâ fide*, but void as against defendants Nos. 1 to 3 and 7 to 11; and this, so far as we can see, is really the only question in the cause. But the defendants have raised the preliminary point, upon which the suit has been dismissed by the Courts below, that the plaintiff, instead of bringing one suit, should have brought five separate suits one against each of the defendants 7 to 11.

In support of this objection a Full Bench case has been referred to, *Rajaram Tewari* v. *Luchman Prasad* (1), in which Sir Barnes Peacock in giving judgment observed upon the inconvenience of one suit being brought against several defendants, *each of whom*

(1) B. L. R., Sup. Vol., 731. 8. W. R., 13.

had a distinct and separate interest, and each of whose cases depended upon different points and different evidence.

That case appears to us to be very clearly distinguishable from the present; and in order to understand the distinction, it is only necessary to pay a little attention to the Full Bench judgment. It will be observed that the defendants in that case claimed under different titles, and that their respective cases depended upon wholly diverse evidence and considerations.

The case of each defendant was a separate contest. There was therefore ample reason for the remark of Sir Barnes Peacock at the close of the case: "The necessity of separating all these different cases in delivering judgment in appeal shows the difficulty and annoyance to which defendants must be put by being joined in one action in respect of different causes of action, to set aside various deeds executed under different circumstances, and in respect of which they have no common interest."

The present is a case of a totally different character. The plaintiff has but one object, namely, to establish his private purchase as against the sale in execution; and the defendants, who contest his claim, *have but one defence, which is common to them all, viz., that the plaintiff's purchase is invalid.*

The plaintiff might, as a matter of strict law, if he had been so advised, have brought five different suits instead of one, each to try the self-same question; but if he had done so, he would probably have incurred a good deal of blame, and not without good reason, for multiplying suits and expense to no good purpose.

There is also another consideration in this case, which does not appear to have occurred to either of the Courts below, namely, that by dismissing this suit upon the preliminary point they were depriving the plaintiff for ever of trying his case against the defendants upon the merits. If, as the defendants contend, the plaintiff had but one year after the order in the execution proceedings to bring his suit, the effect of the dismissal of the suit upon this technical ground would have been to bar the door of justice against him for ever.

Courts of law should be especially careful in dealing with technical objections to see what effect their decision will have in defeating substantial justice.

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The case must go back to the Court of first instance for retrial upon its merits.

The respondents must pay to the appellant the costs of the proceedings in all the Courts so far as they have gone, inasmuch as it was at their instance that the preliminary objection has been allowed.

Appeal allowed.

PRIVY COUNCIL.

P. C.*
1882
November 17.
December 9.

JANOKI DEBI (PLAINTIFF) *v.* GOPAL ACHARJIA GOSWAMI AND OTHERS (DEFENDANTS).

[On appeal from the High Court at Fort William in Bengal.]

Hindu Law—Endowment—Succession to the management of a religious endowment, as sebait—Usage of the institution.

On a claim to succeed to the management, as sebait, of a religious institution endowed with property, it was contended that in the absence of prescribed rule, or of established usage, succession took place according to the ordinary rules of the Hindu law of inheritance, where the sebait led a family life.

Held, that, where owing to the absence of documentary or other direct evidence, it does not appear what rule of succession has been laid down by the endower, it must be proved by evidence what is the usage. In the present instance the usage did not support the claim; and, upon the evidence, the claimant, who was out of possession, failed to make a title.

APPEAL from a decree of the High Court (29th January 1877), upholding a decree of the Subordinate Judge of Manbhoom (31st August 1874), whereby appellant's suit was dismissed.

The appellant claimed to succeed to the management of a religious endowment, as sebait, and set up a title relying on the application of the ordinary rules of the Hindu law of inheritance.

Whether those rules were applicable to the succession to the management of this institution, and also, whether a title under them had been made out, were questions decided, among others, in the judgment of the High Court (1), forming the subject of this appeal.

(1) *Janokee Debia* v. *Gopal Acharjea*, I. L. R., 2 Calc., 365.

* *Present:* LORD FITZGERALD, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH, and SIR A. HOBHOUSE.

The endowment, of which the appellant claimed to have inherited the maurasi right of management, with possession, comprised 57½ villages, described in the plaint as brahmottar and debattar lands, in Pergunnah Chaurian in Maubhoom, valued at more than 2½ lakhs of rupees.

These had been granted by former Rajahs of Panchkot or Pachit, for maintaining the Séba, or worship, of Keshab Rai, a local deity worshipped at Bero by the gurus of the family of the Rajah for the time being. The principal respondent who asserted his right to the guddi of the institution was Sri Gopal Acharjia Goswami, the natural father of the appellant's deceased husband, Bijai Lakhan. According to the appellant's case, Bijai had been duly adopted in infancy by Lakhan, formerly a sebait of the institution, who died in 1859. Bijai died in 1863, a minor and childless, leaving the appellant his widow, also then a minor, on whose behalf, as she now alleged, the Déb Séba was performed by her relations; and according to a ruffanama, with which she now declined compliance, part of the income of the institution was set apart for her.

As to the validity of the adoption of Bijai Lakhan, which had been disputed on the ground of his having been the eldest son of his natural father, there was no appeal preferred against so much of the judgment of the High Court (1) (MARKBY and MITTER, JJ.) as held the adoption not to have been thereby invalidated.

As to another question, *viz.*, whether, inasmuch as the institution at Bero had been endowed by the Pachit Rajahs, the title of any sebait was complete without confirmation of it by the Rajah of the day (the present Rajah having intervened as a defendant), both the Indian Courts had found against the Rajah's having any such right.

All the facts material to this report are stated in their Lordships' judgment.

On this appeal,—

Mr. *Cowell* appeared for the appellant.

Mr. *C. W. Arathoon* for the respondents.

(1) I. L. R., 2 Calc., 366.

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For the appellant it was argued that, where (as here) the sebait led a family life, in the absence of any rule prescribed for the succession to the head-ship of the institution by those who had endowed it, and also in the absence of any established usage in the matter, the office of sebait descended in the family according to the ordinary rules of inheritance of Hindu law. Reliance was placed on the words of Sir T. Strange (1), who, after distinguishing lands endowed for religious purposes as not inheritable at all, as private property, adds: "Though the management of them, for their appropriate object, passes by inheritance subject to usage, as in the case of many of the religious establishments in Bengal, where the superintendence is, by custom, on the death of the incumbent, elective by the neighbouring 'mohants' (2), or principals of other similar ones." In the case of this institution the right of management of the property forming the endowment was not severed from the religious office; and no such usage as was referred to in the above, and in *Greedharee Doss* v. *Nundokissore Doss Mohunt* (3), had been proved. Without such proof of special usage the widow's claim, founded on the ordinary rules of inheritance, could not be defeated, and her title was complete. The burden of proving either prescribed rule, or special usage, was on the defence, and neither of them having been proved the canon of descent by Hindu law must prevail.

Reference was also made to Strange's Hindu Law, Vol. I, Chap. IX; and to Vol. II, appendix to Chap. IX, a note by Colebrooke; Mayne's Hindu Law and Usage, s. 364; *Widow of Rajah Chutter Sein* v. *Younger widow* (4); *Jotindro Mohun Tagore* v. *Ganendro Mohun Tagore* (5); *Rajah Chundernath Roy* v. *Kooar Gobindnath Roy* (6); *Mussamut Jai Bansi Kunwar* v. *Chattardhari Singh* (7); *Rajah Ramalinga* v. *Perianayagam Pillai* (the *Ramnad case*) (8); *Neelkisto Deb Burmono* v. *Beerchunder Thakoor* (9).

(1) 1 Strange, Hindu Law, Chap. VI, p 151.

(2) In the evidence in this case the Bengali word "sebait," and the Hindustani "mohant" were used indifferently.

(3) 11 Moore's I. A., 403.

(4) 1 Sel. Rep, 180.

(5) 9 B. L. R., 377.

(6) 11 B. L. R, 86

(7) 5 B. L. R, 181.

(8) L. R., 1 I. A., 209.

(9) 12 Moore's I. A, 523. 3 B. L. R., P. C., 13

For the respondents Mr. *C. W. Arathoon* argued that the ordinary rules of the Hindu law of inheritance were not applicable in this case; and that, had they been so, the appellant had failed to show a good title according to them. If the ordinary rules of inheritance prevailed, a title traced through four succeeding daughters could not be said to accord with any rule of Hindu law. But both the Courts in India had found that the succession in this case was not regulated by the Hindu law of inheritance, and thus the claim was not maintainable. As a general rule, moreover, a woman could not hold the office of sebait; and, if this institution was to be considered an exceptional one, proof of its being so should have been given by the plaintiff. On the contrary, however, the weight of the evidence showed that no one except the Raj Guru of the Pachit family could be the sebait of the institution at Bero. Again, the defendant Sri Gopal Acharjia had a title supported by family arrangement, and equity favored such arrangements, when made *bonâ fide*, as this had been. On the question, how the office of sebait should be disposed of, where, from circumstances, there could be no recourse to any rule of the foundation, reference was made to *Mahdo Das* v. *Kamta Dass* (1); *Niranjan Barthi* v. *Padarnath Barthi* (2).

Mr. *Cowell* replied.

Their Lordships' judgment was delivered by

SIR R. COUCH.—The appellant in this case brought a suit to recover possession of certain properties which she alleged in the plaint to be partly brahmottar and partly debattar, the latter being dedicated to certain deities of the names of Keshab Rai and others, and also for the possession of the deities themselves from the hands of the first defendant, Sri Gopal Acharjia Goswami. Although the plaintiff described part of the properties claimed as her own brahmottar, which had devolved upon her by right of inheritance, it appeared on the hearing before the first Court, and was admitted by both parties, that the whole of the properties claimed belonged to the deities.

The plaintiff's case was that the properties were in the possession of Lakhan Acharjia Goswami as sebait of the idols; that he

(1) I. L. R., 1 All., 539.

(2) I. S. D. A. (N. W. P.) 1864, p. 512.

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having no son of his body, took the plaintiff's husband, Bijai Lakhan Acharjia, in adoption, and died in October or November 1859; that Bijai Lakhan being then a minor, his mother took possession of the properties on his behalf, the right of sebaitship having devolved upon him in the same way as any other property of the deceased would have devolved upon him by right of inheritance; that the idols were established by a remote ancestor of her husband, and the right had devolved from one person to another, following the rule which governs the succession of an ordinary heritable property.

The plaintiff further alleged that the mother remained in possession, on behalf of her minor son, up to 1863, when he died, and the right of sebaitship devolved upon the plaintiff, as his widow, but she being then a minor her mother-in-law managed the Déb Séba for her up to the time of her death, which occurred in March 1864; that upon the death of her mother-in-law, the first defendant, Gopal Acharjia, one of the respondents in this appeal, who was the natural father of Bijai Lakhan, attempted to take possession of the properties along with the Déb Séba, and was opposed on her behalf by her father and maternal uncle, the second and third defendants and also respondents, and that a compromise was effected between them, which the plaintiff sought to set aside as collusive. As the father and uncle do not appear to have had any legal authority to act as the plaintiff's guardians, and the compromise has not been relied upon, it is unnecessary to notice it further.

The defence of Gopal Acharjia was, that the suit was barred by the law of limitation; that the adoption of the plaintiff's husband was not valid according to Hindu law; that the plaintiff, being a female, was not competent to perform the duties which ordinarily devolve upon a sebait, and to fill the office; and that, according to the usage of the family, and the rules regulating the appointment of mohants to the guddi, he was entitled to succeed to the Déb Séba estate on the death of Bijai Lakhan, and the plaintiff had no right whatever; that originally the Déb Séba was founded by an ancestor of the present Rajah of Pachit, and the title of sebait was not complete unless he was confirmed in his appointment by the Rajah of Pachit for the

time being; and that Rajah Nilmoni Sing Deo, the present Rajah, had made the confirmation in his favor. Rajah Nilmoni Sing Deo was added as a defendant, and put in a written statement to the same effect as the last allegation.

The first Court decided the question of limitation in the plaintiff's favour, and the defendants did not appeal from that decision. It then found that the plaintiff's husband Bijai was duly adopted by Lakhan Acharjia, and the customary ceremonies of adoption were performed, but that, he being the eldest son of Gopal Acharjia, his adoption by Lakhan was invalid.

The suit was dismissed, and the plaintiff appealed to the High Court, which held that the lower Court was wrong in holding that the adoption of the plaintiff's husband was invalid by reason of his having been the eldest son of his natural father; but upon the question whether the plaintiff was entitled upon the death of her husband to succeed as sebait, the Court held that, although there was no satisfactory evidence that the appointments of sebait had been made by the Rajah of Pachit, the evidence did not establish the plaintiff's right to succeed under the Hindu law of inheritance. The appeal was therefore dismissed.

The plaintiff has appealed to Her Majesty in Council, and it has been contended on her behalf that, in the absence of prescribed rules, or usage, the ordinary law of inheritance applies.

It appears to follow from the judgments of their Lordships in *Greedharee Doss* v. *Nundokissore Doss Mohant* (1), *Rajah Muttu Ramalinga Setupati* v. *Perianayagum Pillai* (2), and *Rajah Vurmah Valia* v *Rajah Vurmah Mutha* (3), that when, owing to the absence of documentary or other direct evidence, it does not appear what rule of succession has been laid down by the endower of a religious institution, it must be proved by evidence what is the usage.

The greater part of the villages in dispute were dedicated to the idols more than a century ago, by the then Rajah of Panchkot or Pachit, and from time to time other villages have been added to the endowment. The first sebait was Rungraj

(1) 11 Moore's I. A., 428. (2) L. R., 1 I. A., 209.
(3) L. R., 4 I. A., 76 (see p. 83): S. C. I. L R., 1 Mad., 235.

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Goswami, who left an only daughter, Auchuma, who married, and had issue an only daughter, Boncooma; she married, and her only issue was a daughter, Lukhipria, and according to the plaintiff's case Lukhipria had an only daughter, Kedro Bibi, who married Lakhan Acharjia, and had a son, Srinibash, the grandfather of the plaintiff's husband. The plaintiff asserted that the four daughters succeeded each other as sebaits; the defendant Gopal on the contrary asserted that their husbands were the sebaits. It appeared, however, that Lukhipria held the guddi for nearly 60 years, her husband having died first, which is inconsistent with the latter contention. Now, whether the four daughters succeeded each other or their husbands were the sebaits, the succession was not according to Hindu law, as a daughter's daughter is not an heir except in certain cases of stridhan, and a son-in-law has no right of succession. There is no doubt considerable difficulty in ascertaining what is the rule of succession to this office, but it is certain that the usage has not been according to the ordinary rules of inheritance under Hindu law. Not only does the usage not support the plaintiff's claim, but it is opposed to it. It is not for their Lordships to consider whether there is any infirmity in the title of the respondent Gopal, who has been in possession many years, with the consent, if not by the appointment, of the Rajah. The plaintiff being out of possession must recover upon the strength of her own title, and not on the weakness of that of the defendant. Their Lordships have, therefore, only to consider whether the appellant has made out her title, and they are of opinion that the High Court was right in holding that she had not. They will humbly advise Her Majesty to confirm the judgment of the High Court, and to dismiss the appeal. The costs will be paid by the appellant.

Appeal dismissed.

Solicitors for the appellant: *Messrs. Barrow and Rogers.*

Solicitor for the respondents: *Mr. T. L. Wilson.*

ORIGINAL CIVIL.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Cunningham.

SREENATH ROY (PLAINTIFF) *v.* RADHANATH MOOKERJEE (DEFENDANT)

1882 *July 7.*

Appeal—Administration Suit—Order directing an account—Civil Procedure Code (Act X of 1877), s. 244.

An order directing an account is not an order in the nature of a final decree, and is unappealable; such an order merely directs certain proceedings to be taken, in order that a final decree may thereafter be made.

BY a decree, dated the 3rd September 1877, in an administration suit between *Sreenath Roy* v. *Radhanath Mookerjee and others*, it was, amongst other things, ordered that Sreenath Roy was entitled to recover from the estate of Jogendronath Mookerjee a sum of Rs. 18,000 with interest, and the further hearing of the suit was adjourned for the taking of accounts, the Receiver of the Court being appointed Receiver to the estate of Jogendronath Mookerjee; and the consideration of further directions was reserved until after the accounts and enquiries directed should be taken and made, liberty being reserved to all parties to apply as they might have occasion.

In 1874 and 1875 two suits, Nos. 67 of 1874 and 307 of 1875, between *Radhanath Mookerjee, an infant (son and heir of Jogendronath Mookerjee) by his mother and next friend* v. *Chunder Kant Mookerjee and others*, and *Koosum Coomaree Dabee, widow of Ramnarain Mookerjee* v. *Chunder Kant Mookerjee and others*, were instituted for the partition of the joint family estate of Ramnarain Mookerjee; and on the 13th September 1880, an order was passed in these two suits (which had been amalgamated), directing that the accounts filed by the defendants in the first suit should be taken as they stood up to the death of Jogendronath, and that the defendants Chunder Kant and Prankristo should pay to the infant plaintiff, Radhanath, in that suit, Rs. 5,000 in full of the said account; and that they should, out of the infant plaintiff's share in the joint estate, when the value of the same should have been ascertained, make provision for the payment

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of the costs of the suits to administer the estate of Ramnarain and Jogendronath Mookerjee and for the payment of the debts of the said Jogendronath and the legacies left by Ramnarain.

The defendants Chunder Kant and Prankristo, under the provisions of rule 594 of the High Court, paid into the hands of the Court Receiver, in pursuance of the order last mentioned, Rs. 5,000 to the credit of the infant Radhanath.

The plaintiff in the administration suit, Sreenath Roy, then applied to the Court for an order, directing the Court Receiver to transfer the said sum of Rs. 5,000, after deducting his usual commission and charges, to the credit of the administration suit, and for the application of that sum in payment of the debt due to him and the other creditors of the estate of Jogendronath who had proved their claims: and further asked that the Receiver might be directed to sell the properties then in his possession for the above purposes.

The grounds for the application were (1), that the Receiver had not as yet made any provision for the payment of the debts of Jogendronath, and that there was ample property belonging to the estate of Jogendronath which had come to the hands of the infant defendant, and which was in the hands of Receiver to satisfy these debts; (2) that the debt due to Sreenath Roy, under the decree of the 3rd September 1877, had been outstanding for more than four years, and that interest was running on it both to his detriment and that of the infant Radhanath Mookerjee.

Nobin Chund Boral, attorney on behalf of the infant Radhanath Mookerjee, opposed the application and put in an affidavit, stating that on the 13th September 1877, the cause in which their present application was made was set down on the reference board, and that Mr. Justice Wilson, after going through the accounts, and on being informed that the bulk of the property belonging to the estate of Jogendronath Mookerjee, deceased, consisted of one undivided fifth share in certain landed property, which formed the subject-matter of the partition suits numbered 67 of 1874 and 307 of 1875, which had been amalgamated for the purpose of taking the accounts, directed the reference to stand over until the accounts were taken; that he had a large claim for

costs which had been already ordered to be paid to him out of the joint estate, and he submitted that the relief sought could not be granted on the present application inasmuch as the suit should have been set down for further directions and the application then made.

Mr. *Allen* for the plaintiff.

Mr. *Trevelyan* for the defendant.

On the 16th March 1882, Mr. Justice Wilson refused the application with costs.

The plaintiff appealed.

Mr. *R. Mittra*, for the respondent, objected that no appeal would lie.

Mr. *Allen* for the appellant contended that the order passed by the Court must be taken as an order made under s. 244 of Act X of 1877, it being a question relating to the "execution, discharge and (partial) satisfaction" of the decree in the administration suit; and that under s. 2 of the same Act, "an order," determining any question mentioned or referred to in s. 244, but not specified in s. 588, is defined to be "a decree," and is therefore appealable: and, further, that an appeal lay under s. 15 of the Charter from the judgment of a single Judge of the High Court: and he submitted that on one or other of these grounds an appeal did therefore lie.

The following judgments were delivered by the Court (GARTH, C.J., and CUNNINGHAM, J.)

GARTH, C.J.—I am of opinion that the preliminary objection must prevail, and that no appeal lies in this case.

Mr. Allen has contended that the order which is appealed against is one made under s. 244 of the Civil Procedure Code, and is therefore appealable under s. 2 of that Act, as amended by Act XII of 1879.

The suit in which the order was made is an administration suit brought by the plaintiff, a creditor, for administering the estate of Jogendronath Mookerjee, and for having the plaintiff's debts ascertained, and paid out of the assets. A decree was obtained, declaring the plaintiff entitled to the sum which he claims, and directing an account to be taken in the usual way.

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The party to the suit who represents the estate is an infant, who appears by guardian, and an attorney named Nobin Chund Boral acts for the guardian.

It then appears that in another suit a sum of Rs. 5,000 has been placed in the hands of the Receiver, on account of the infant defendant in this suit; and an application was made to the Judge in the Court below that this Rs. 5,000 should be paid over to the credit of this suit, and that it should be applied in payment of the debts to the plaintiff and the other creditors of the intestate, who have proved their claims in the suit; and that the said Receiver should sell the properties in his possession and apply the proceeds towards payment of the said debts *pro tanto*.

This application, so far as it concerned the Rs. 5,000, would seem to have been a reasonable and a necessary one; but it was objected to on the part of the infant; and the learned Judge refused the application, not (so far as I can judge from the note which was made by the officer of the Court), because there was no ground for making it, but because it was not made in proper form.

However this may be, the plaintiff did not apply again, as suggested by the learned Judge. If he had done so, and if the sum of Rs. 5,000 had really belonged to the estate, the application would probably have been successful. But he took the course of appealing to this Court, and has insisted upon his right of appealing upon the ground that the order of the learned Judge was a decree made under s. 244 of Act X of 1877, as being "*a decision upon a question which related to the execution of the decree.*"

I am clearly of opinion, looking at what I conceive to be the true meaning of the word "execution" in that and the preceding sections of the Code, that the order in this case is not appealable.

The section forms part of Chapter XIX of the Code, comprising ss. 223 to 343, which all relate "to the execution of decrees," and from the tenor of those sections it seems clear to me that the words "execution of decrees" at the heading of the chapter mean the enforcement of the decrees of the Courts, by what is generally known as "*process of execution.*" The different kinds

of execution dealt with in those sections are against the person and property of the judgment-debtor, or for the restoration of any specific property, land, or goods, or for compelling the judgment-debtor, by attachment, to obey the decree of the Court.

But the order with which we are dealing is of a totally different character.

The order for accounts is not in the nature of a final decree. It only directs certain proceedings to be taken, in order that a final decree may hereafter be made; and the application by Mr. Allen was only an interlocutory one, made in the course of those proceedings, and certainly not for the purpose of enforcing the decree of the Court by a process of execution properly so called.

Mr. Allen contends that his application was one in aid and execution of the decree which the Court has already made; now, if an order of this kind can be appealed against, it seems to me that all the numerous interlocutory orders made in the course of taking accounts or otherwise carrying out the directions of the Court would be equally appealable.

I think therefore that upon this ground the appeal should be dismissed, with costs on scale 2.

CUNNINGHAM, J.—I am of the same opinion. I would only add that the reasons that my Lord has given seem to be reinforced by the language of s. 213, and the form No. 130 of the fourth schedule of the Code of Civil Procedure, which show that in the view of the framers of the Code what is called an administration decree is not really a decree at all, but merely a preliminary order.

Appeal dismissed.

Attorney for plaintiff: Messrs. *Swinhoe Law & Co.*

Attorney for defendant: Baboo *Nobin Chund Boral.*

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Cunningham.

GOPAL CHUNDER MUKERJEE AND OTHERS (PLAINTIFFS) *v.* JUDDOO LALL MULLICK (DEFENDANT.)

1883 January 27.

Right of way—Extent of user—Purpose for which right claimed is strictly identical with original purpose contemplated at commencement of right.

Where a right of way for a particular purpose is proved to have existed for upwards of 20 years, the Court is not bound to confine the right to the precise number of times in the year that it has been exercised, but may construe it *as a right to use the road at all convenient times for the particular purpose.*

THIS was a suit brought by two infants, by their next friend, to have their right to an alleged passage over the defendant's land declared, and to have certain obstructions to such passage, and also certain alleged obstructions to the grating of a drain running under the land, removed, and for damages and for an injunction.

The plaintiffs alleged that they were the owners of a certain house, to which was attached a privy which, before the construction of the underground drainage by the Municipality, used to be drained as of right by, and through, a small drain which ran between their own house and the house of the defendant, finally discharging itself into the large Municipal drain, and that their privy had been at all times as of right cleaned by their servants, who for such purpose passed and repassed over the drain, and that this right of way both they and their predecessors in title had enjoyed for more than forty years; that in 1879 the Municipality constructed an underground drain in the place of their large drain, and stopped the large drain up, and that they (the plaintiffs) at their own expense opened out a communication, by means of pipes, between this underground drain of the Municipality and their own small drain, the privy since that date being drained through the pipes so laid down. That they then filled in their original small drain, and made a path over it, which was used both by themselves and their servants in passing and repassing to the privy; that in December 1880 the defendant obstructed this pathway by placing rubbish upon it, and

thus prevented them (the plaintiffs) and their servants from using the same, and at the same time the defendant also blocked up the grating of a certain surface drain belonging to the plaintiffs and thereby obstructed the discharge of water into their pipes.

The plaintiffs did not claim any ownership in the soil of the pathway, but brought this suit for the purposes abovementioned.

The defendant claimed to be absolute owner of the land claimed as the plaintiffs' right of way, and denied the plaintiffs' claim to the right of way, asserting that it had not been enjoyed as of right since February 1877. He further stated that the filling up of the drain took place in December 1877 and not in 1879.

Mr. *Palit* for the plaintiffs.

Mr. *Branson* and Mr. *Phillips* for the defendant.

Mr. Justice Wilson found that the soil of the place in question was in the defendant, and that the plaintiffs had not satisfactorily shown that they exercised, for twenty years, the right they claimed; that it was impossible for the plaintiffs to have exercised their right of way during the time the small drain was in existence; and that the fact that it had been filled in, and made into a passage about ten or twelve years back, made it impossible for the plaintiffs to have used the right of way for twenty years; and, further, considering that the user of the Municipal mehters was not such as to furnish evidence of previous user, he dismissed the suit.

The plaintiffs appealed.

Mr. *Evans*, Mr. *Bonnerjee* and Mr. *Palit* for the appellants.

The *Advocate-General (Offg.* Mr. *Phillips*) and Mr. *Branson* for the respondent.

Mr. *Phillips*.—The ordinary practice at the time that the alleged user of the plaintiffs began, was to clear the privies three or four times a year, but now they are cleaned out very day; I don't, however, restrict them to the three or four times, but I restrict them to the user they had before the sudden change in the practice, in

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consequence of the Municipality taking up the work, in other words, to the ordinary and reasonable user at the commencement of the user. It is in such a user that the defendant is assumed to have acquiesced, and although he may have acquiesced, for the last four or five years in a larger user, this will not enlarge the right, unless continued for 20 years, although it might, if known, have been evidence to show that the increased user was in accordance with the right. A user cannot be increased. *Allan* v. *Gomme* (1) was a case of an increased or altered user in consequence of the conversion of a wood house into a cottage. In *Henning* v. *Burnet* (2) Parke, B., says: "A right of way to a cottage ceases if the cottage is turned into a tan yard." These were cases of grants, but they show that if you have a limited right of way you cannot increase the user to make it a general right of way. In the case of *Williams* v. *James* (3) the defendant, who was entitled to a right of way by user over the plaintiffs' land from field N, honestly and without the intention of increasing the right of user, used the way for the purpose of carting from field N some hay stacked there, which had been grown partly there, and partly on land adjoining, and it was held not to be an excess user in the user of the right of way; the principle is, however, clearly laid down that the right is measured by the actual user. In *Baxendale* v. *McMurray* (4), the defendant had obtained the prescriptive right to discharge into a river washings arising from the manufacture of rags in the manufacture of paper; he afterwards made his paper from vegetable fibre and discharged the refuse as before into the river; it was held in a suit to restrain the defendant from polluting the river to a greater extent than it was polluted before the change in the system of manufacture, that the easement to which he was entitled was a right to discharge into the river the washings produced by the manufacture of paper in the reasonable and proper course of such manufacture, using any proper materials for the purpose, but not substantially increasing the pollution; and that the onus lay on the plaintiff to show any increase of pollution.

Where an easement to land is granted, the use of it will be restricted to a reasonable use for the purpose of the land in the

(1) 11 A. and E., 759.
(2) 8 Exch., 187.
(3) L. R., 2 C. P., 577.
(4) L. R., 2 Ch. App., 790.

condition in which it was when the grant was made or the user took place. *Wood* v. *Saunders* (1) was the case of a grant; there A demised to B a house with the right to the free passage of water and soil in and to the existing cesspools, and to certain drains then in existence. B was not at liberty to alter the buildings without the lessor's consent, which was never obtained. B in 1872 bought the house, and at that time part only of the drains from the house ran into a moat which belonged to A. B in 1873, enlarged his house and turned it into a lunatic asylum with 150 inmates and discharged the whole drainage of the house into the moat. A threatened to stop the drains, and B filed a bill to restrain him from so doing, and the plaintiff obtained an order protecting him in the reasonable use of the cesspool, to the extent to which the same was used prior to the demise to him. See also *Wimbledon and Putney Commons Conservators* v. *Dixon* (2).

The case of *Finch* v. *Great Western Railway Co.* (3) recognizes the principle that the extent of a right by user is to be measured by the extent of the user. But there are other objections to the plaintiff's claim.

The user alleged is in its nature likely to escape observation, and it is not shown to have been open, or such as would be likely to attract any attention. Morever, from the situation of the buildings, there would be very little opportunity to observe the plaintiffs' mehters. A burden ought not to be imposed upon another, upon such a user as this—see *Bhuban Mohun Banerjee* v. *Elliott* (4). Again the plaintiffs claim a right for themselves and their servants: the Municipal mehters are not their servants nor under their control. At any rate, even if they could exercise their right through them, the plaintiffs could not acquire such a right by their choosing to come to the defendant's house over the plaintiffs' land.

But there is a fatal objection, and that is, that according to the evidence all that the Municipal mehter did was to come to plaintiffs' privies, clean them and then go on to the defendants',

(1) L. R., 10 Ch. App. 582.
(2) L. R., 1 Ch. D., 362.
(3) L. R., 5 Ex. D., 254.
(4) 6 B. L. R., at pp. 98 and 104.

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This took place for about the last three years, and there is no other evidence as to their proceedings. This, however, is not a user of the way at all: the mehter came on the defendant's land not in exercise of any right of the plaintiffs, but for the purpose of cleaning the defendant's privy, and he merely went on from there for his own convenience, and not in the exercise of any right of the plaintiffs'. Then, if this is so, there is no user within two years of suit, as required by s. 27 of the Limitation Act. User ought to be proved in every year, or at any rate, in the first and last years of the term. *Parker* v. *Mitchell* (1); *Lowe* v. *Carpenter* (2).

The following judgments were delivered:—

GARTH, C. J.—I regret very much that the parties in this case should not have been able to adopt the suggestion of the Court, and settle their differences out of Court; but as they have failed to do so, it is necessary that we should give our judgment; and I feel bound to say that I cannot take the same view of the case as the learned Judge in the Court below.

I quite think that the plaintiffs' evidence is not as precise as it might have been, either as to the number of years, during which the right claimed has been exercised, or as to the particular mode or times of the alleged enjoyment.

It very rarely happens in my experience that the evidence of native witnesses in cases of this kind is very accurate. But on the whole I think it sufficiently appears that a right, such as the plaintiffs' claim, has been exercised from time to time for upwards of 20 years before suit; and the probabilities of the case seem to me greatly in favor of that view.

Certain facts giving rise to those probabilities are almost beyond dispute. The plaintiffs' house has existed substantially in its present state for a great number of years; the western wall of that house abutted upon the defendant's premises; and certain privies, habitually used by the inmates of that house, were situate in the south-west corner of the plaintiffs' compound.

Before the new sanitary rules were made by the Calcutta Municipality, these privies were used and managed in the same way as

(1) 11 A. & E., 788. (2) 6 Ex, 825.

most others in the native quarters of Calcutta; that is to say, their contents were received into cesspools sunk in the ground, and were then emptied and carried away from time to time as convenience or necessity required.

There also seems no doubt that the fall of the ground, on which the plaintiffs' house was built, was from south to north, and that from these privies there was a passage enclosed by two walls running from south to north along the western boundary of the plaintiffs' premises, by means of which all the refuse water from the cesspools flowed away to the north-west corner of those premises, where there was a door opening out upon a drain, into which certain privies, used by the defendant's family, emptied themselves.

This drain, the soil of which belonged to the defendant, was an open one. It received through the door, which I have just mentioned, the refuse water of the plaintiffs' privies; and it then continued to run from south to north into Prosunno Coomar Tagore's Street, receiving also in its way the contents of other privies.

The plaintiffs' case is, that from time to time their cesspools were emptied by mehters in the usual way, and their contents carried along the passage between the two walls, and so along this open drain into Prosunno Coomar Tagore's Street. It is clear that if the privies were used, about which there seems to be no doubt, their contents must have been emptied somewhere; and it is neither proved nor suggested by the defendant that there was any other mode by which their contents were removed, except that which has been deposed to by the plaintiffs' witnesses. And it is very difficult to understand for what purpose the inner wall forming the passage from south to north could have been built, except for carrying off the contents of the cesspools.

The only real question of fact, as it seems to me, is, whether there is sufficient proof that the plaintiffs have used the open drain for the purpose alleged for the period of 20 years before suit. Now it certainly seems highly probable that if the house itself has existed in its present condition for some 30 or 40 years, the same means has been always adopted for emptying the cess-

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pools; and it is certainly proved to my satisfaction that the door at the north-west corner of the plaintiffs' premises, through which it is said that the mehters passed, is a very old door; and it is difficult to see for what purpose that door could have been placed there or used, except that of cleaning out the cesspools.

The durwan, who has been in the plaintiffs' service for from 20 to 25 years, says that he has known that door ever since he was in their service; and that it was an old door when he came there. He tells us that mehters used always to come through it for the purpose of removing the night-soil; that when they came, they used to call to him to open the door, and that when they went away they used to call to him to lock it; and that he invariably kept the door locked from the inside. He says this was always done three or four times a year; and he has also done the same for the Municipal mehters since they have cleaned the privies.

The evidence of this man is confirmed by that of Oghore, the sweeper, who tells us that he has been in service of the plaintiffs and their father for 16 or 17 years; that he employed the mehters to wash the privies and clean the drain; and that he used to bring mehters of his own for the purpose, whom he paid with his master's money. He describes clearly enough the way in which they used to clean the cesspools, and carry out the contents, along the west side of the plaintiffs' premises into the open drain beyond.

I confess I see no sufficient reason for doubting the truth of what these men have stated, and their evidence is certainly corroborated by Tarrabullub Chatterjee, an attorney of this Court, who knew the premises upwards of 25 or 30 years ago, and speaks to the way in which the mehters used to come and cleanse the privies; and also by Dwarkanauth Banerjee, who lives in an adjoining house, and who says that he has known the drain between plaintiffs' and defendant's premises for upwards of 25 years.

The only point which the defendant has attempted to make in opposition to this evidence of the plaintiff's is, that the open drain along which it is said the mehters passed, was generally

in such a filthy state from the quantity of foul matter which flowed into it, that it was impossible for mehters to pass down it in the manner described by the plaintiffs' witnesses.

In support of this view the defendant himself, Baboo Juddoo Lall Mullick, was called as a witness. He describes the dirty state in which the drain was, partly from his own privies and partly from those of his tenant's being emptied into it. He says it was choked with filth and weeds, and that he never saw any one pass down there; and Mr. Edwards, who is the Road and Conservancy Overseer under the Municipality, says that he has known the drain since 1875, and that it was in a very foul state and very full of night-soil. He states, however, that while the drain was being cleaned, he did go up it himself, but not beyond a certain distance.

I observe that the learned Judge in the Court below, in dismissing the plaintiffs' case, has laid some stress upon the evidence of these two witnesses. Now I have no doubt it is quite true that Baboo Juddoo Lall Mullick, who is a gentleman of good fortune and position, may never have seen the mehters going backward and forward to plaintiffs' privies, because they did not go there very often, and when they did, it was very early in the morning, and I can quite understand that Mr. Edwards would naturally be disinclined to walk through a quantity of night-soil, unless pressed by some urgent necessity to do so. But this was all part of the mehters' business, and it appears, moreover, that there were certain seasons in the year when Baboo Juddoo Lall Mullick's privies were cleaned out, and it is probable that these seasons were selected by the plaintiffs' servants to employ mehters to clean out their master's cesspools.

On the whole it appears to me that the evidence adduced by the plaintiffs shows a user of the right which they claim for upwards of twenty years before suit; and I see nothing in the defendant's evidence to rebut it.

The only difficulty which I feel is, *as to the extent of the plaintiffs' right.* Are they entitled to the use of the drain only three or four times in a year, which, according to the evidence

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of the darwan, was as often as they were in the habit of using it; or ought we to give the evidence of user a more liberal construction, and say that they had a right to the drain for the purpose of cleansing their privies as often as necessity required? I confess I have had some doubt about this and I have found no direct authority upon the subject; but I have come to the conclusion that the latter is the more reasonable view to adopt. The times at which the plaintiffs' cesspools were cleansed were (according to the evidence) no particular stated periods. The cesspools were emptied, according to native custom, as many times in the year, as they became full; and I cannot doubt that if the number of the plaintiffs' family had increased, so that it became necessary to empty them more often, the plaintiffs would have had a right to use the drain for that purpose.

It has now become necessary, in consequence of the new Sanitary Rules of the Municipality, to cleanse the privies every morning; and if the true construction of the plaintiffs' right was, as I conceive it to be, to use the drain as often as was necessary for cleansing the privies, it follows that they may now use them every morning.

The times at which they should do this should of course be proper and convenient times. The evidence is that the filth was removed in the early mornings; and probably this would be the most convenient time now for its removal.

It has been strongly urged upon us that if we put this construction upon the plaintiffs' right, we shall be imposing upon the defendant, as the owner of the servient tenement, a much heavier burthen than according to the ancient user of the drain he ought to bear. But it must be borne in mind that, so far as *the quantity* of sewage is concerned, no larger quantity will be carried down the drain now than has always been carried heretofore. It will only be carried more frequently, and in much smaller quantities, and, so far as health is concerned, I suppose that the present system is likely to be more healthy than the former one.

I think, therefore, that the judgment of the Court below should be reversed, and that the plaintiffs should be declared entitled to use the drain in question, for the purpose of carrying away their night-soil at all convenient times in the year.

The defendant will be restrained from interfering with the plaintiffs' proper user of the drain; but as the suit was brought to try what was a question of right, we do not consider that there is any ground for awarding substantial damages.

The plaintiffs will be entitled to their costs in both Courts on scale 2.

CUNNINGHAM, J.—I concur in holding that the enjoyment of an easement for twenty years prior to the suit is established by the evidence, and also in the view that the easement must be taken to have been a right of way for the purpose of cleansing the plaintiffs' privies at all such times as the plaintiffs could reasonably claim to exercise such a right. Several cases were cited before us in support of the contention that, as in cases of rights which depend on user, "the right acquired must be measured by the extent of the enjoyment which is proved," we ought in this instance to limit the plaintiffs' right of way to the number of occasions in the year on which it could be shown that the way had been used: but the cases do not appear to me to justify such a restriction. It is no doubt the rule that where there is a right of way proved by user, the extent of the right must be proved by the extent of the user. *Wimbledon and Putney Commons Conservators* v. *Dixon* (1); *Finch* v. *G. W. Railway* (2); but neither these cases nor the others cited, *Williams* v. *James* (3), *Allan* v. *Gomme* (4), *Henning* v. *Burnet* (5), appear to me to justify the view that, where a right of way for a particular purpose is proved, the number of occasions on which it may be enjoyed must be limited to the number of occasions on which it can be shown to have been exercised. The "extent of user," which the Courts have had occasion to consider in these cases, has had reference rather to some departure from the original purpose, or the application of the right to some matter other than that contemplated at the commencement of the right, than to frequency of the occasions on which the right may be enjoyed. In the present instance the purpose for which the right is claimed is strictly identical

(1) L. R., 1 Ch. D., 362.
(2) L. R., 5 Ex. D, 254.
(3) L. R, 2 C. P, 577.
(4) 11 A. and E., 759.
(5) 8 Exch., 187.

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with the original purpose, though inclination, custom, or a change of the law may lead to its more frequent exercise On these grounds I concur in admitting the appeal with costs throughout

Appeal allowed

Attorneys for the appellants *Messrs Swinhoe & Co*

Attorneys for the respondent *Messrs Beeby & Rutter*

APPELLATE CIVIL.

Before Mr Justice Prinsep and Mr Justice Wilson

1883 *February* 26

ISHAN CHUNDER BANDOPADHYA (DEFENDANT) *v* INDRO NARAIN GOSSAMI (PLAINTIFF) *

Sale in Execution of Decree—Payment not certified to Court—Fraud—Setting aside Sale—Cause of action—Regular suit

A obtained a money decree against *B* and others jointly for Rs 112 and in consideration of a payment of Rs 25 made by *B* agreed to release *B* from all liability under the decree This payment was not certified to the Court, and *A* afterwards in execution of the decree had certain immovable property belonging to *B* put up for sale and this property he purchased himself

Held that a suit would lie by *B* to set aside the sale and to recover the property from *A*

THE facts of this case are stated as follows by the Judge of the lower Appellate Court —

"On the 19th of April 1873 the defendant, Ishan Chunder Bandopadhya, obtained a decree against Nuffer Chunder Gossami and four others jointly, by which the debtors were directed to pay to the decree-holder Rs 112 An application for execution was made on the 28th of February 1876, but without any satisfactory result The application appears to have been removed from the file in March 1876 The next application for execution was made on the 20th of December 1878 Notice was served on the debtors on the 14th of Magh 1285 (29th January 1879), and returned on the 3rd of February 1879 On the very next day Indro Narain Gossami came in and objected to the execution, saying that he had paid Rs 25 to the decree-holder, and that the decree-holder

* Appeal from Appellate Decree No 1614 of 1881 against the decree of Baboo Brojendro Coomar Seal Judge of Bankoora dated the 3rd June 1881 affirming the decree of Baboo Jogendro Nath Bose Munsiff of Gangajal Ghat dated the 22nd March 1880

had absolved him from all liability under the decree. As the fact of payment on the said arrangement had not been certified to the Court, it was not at liberty to enter into the matter in the execution proceedings. The decree-holder, however, was asked as to whether or not he had received the said Rs. 25 and whether he had released Indro Narain from liability under the decree. The decree-holder admitted having received the amount, but denied having expressed his intention of not taking out execution against him. There the matter ended. The order of the Court directing execution to issue against Indro Narain bears date the 25th of February 1879." Under this order the property of Indro Narain was sold and purchased by the decree-holder, Ishan Chunder Bandopadhya. The plaintiff then brought the present suit to have the sale set aside on the ground of fraud. The learned Judge of the lower Appellate Court having gone through the evidence said: "I agree with the Court below in finding that the decree-holder had released the plaintiff from all liability under the decree, and that therefore his conduct in taking out execution against him was fraudulent. The sale must, therefore, be set aside." The defendant appealed to the High Court on the grounds (1), that the alleged adjustment having been set up in the execution proceedings could not be again brought forward in a subsequent suit; (2), that the suit was barred by the provisions of s. 244 of the Civil Procedure Code; and (3), that the alleged promise to release the plaintiff was a *nudum pactum*.

Baboo *Rash Behary Ghose* for the appellant.

Baboo *Nil Madhub Sen* for the respondent.

The judgment of the Court (PRINSEP and WILSON, JJ.) was delivered by

PRINSEP, J.—It has been found by the lower Appellate Court that the defendant, who held a decree against the plaintiff and others, agreed to take, and did take, from plaintiff Rs. 25, as representing his liability under this joint decree, and at the same time undertook to abstain from further proceedings, but that notwithstanding he persisted in executing the decree and sold certain property belonging to the plaintiff.

The only question raised before us is, whether under the Code of Civil Procedure now in force, a suit will lie to set aside the

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sale of plaintiff's property as having been held fraudulently, and in breach of the undertaking on receipt of the money paid out of Court in satisfaction of the liability of the plaintiff judgment-debtor under the decree, whether the law (s. 258) having placed it in the power of a judgment-debtor making such a payment to obtain the assistance of the Court, within a certain specified period, to require the decree-holder to certify that payment, any suit brought practically for the same purpose is not barred.

As an authority that the present suit will not lie, the case of *Patankar* v. *Devji* (1) has been cited. On the other hand, we find that in the case of *Guni Khan* v. *Koonjo Behary Sein* (2) it has been held by a Division Bench of this Court that the law is unaltered by the Code of 1877, re-enacted by Act XIV of 1882. In respect of the matter now before us we find no material difference between s. 11, Act XXIII of 1861, now repealed, and s. 244 of the Code of Civil Procedure which has taken its place, and we observe that it was after full consideration of the effect of s. 11, Act XXIII of 1861 on a payment in satisfaction of a decree made out of Court that the judgment of a Full Bench of this Court in the case of *Gunamani Dasi* v. *Prankishori Dasi* (3), was delivered.

Nor do we think that the terms of the last sentence of s. 258 have altered the law as thus expounded. No doubt it has been declared that "no such payment or adjustment shall be recognized by any Court unless it has been certified" according to s. 258, but in our opinion this refers to any Court of execution, either the Court which itself passed the decree and is executing it, or any Court to which the decree may have been transferred for purposes of execution. It seems to us that whenever the Legislature has intended that any matter shall not be re-opened in any subsequent suit or proceeding, it has indicated that intention by more definite terms by either declaring that no subsequent suit shall lie, or that the particular order shall be final.

In this view on the findings of the lower Appellate Court, the plaintiff is entitled to a decree, and this appeal must be dismissed with costs.

Appeal dismissed.

(1) I. L. R., 6 Bom., 146. (2) 3 C. L. R., 414.
(3) 5 B. L. R., 223. 13 W. R., F. B., 69.

SMALL CAUSE COURT REFERENCE.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Wilson

JUGGERNAUTH SEW BUX AND ANOTHER (PLAINTIFFS) *v.* RAM DYAL AND OTHERS (DEFENDANTS.)

1883 *March* 1.

Contract for sale of Government Securities—Time bargain—Contract Act, ss. 23 *and* 30—*Evidence Act* (*I of* 1872), *s.* 92—*Tender—Readiness and willingness.*

The question whether an unambiguous written contract for the sale and purchase of Government paper is a contract or agreement by way of wager, must be decided on the expressed terms of the contract itself, and parol evidence is not admissible to vary or contradict those terms.

Where a contract for the sale and purchase of Government paper provides for the delivery of the paper on a subsequent date, it is not necessary, in order to sustain an action against the buyer for non-acceptance on the due date, that the plaintiff should have taken the Government paper contracted for to the place of business of the defendant and then and there made an *actual* tender of it.

THIS was a case stated for the opinion of the High Court under s. 7 of Act XXVI of 1864, by Baboo Koonjo Lal Banerjee, one of the Judges of the Calcutta Court of Small Causes. The case referred was as follows :—

"This was a suit brought by the plaintiffs to recover Rs. 1,000, after abandoning an excess of Rs. 93-12, being the amount of damages or loss sustained by him on a contract for the sale of Rs. 25,000 Government Securities. The contract is dated 1st July 1881, and delivery was to have been taken on the 1st or 2nd September following. The rate at which the paper was sold was Rs. 104-13 per cent. The rate on due date was Rs. 100-7, the difference or loss was therefore Rs. 4-6 per cent., the total amount being Rs. 1,093-12 ; the excess Rs. 93-12 has been abandoned in order to bring the case within the jurisdiction of this Court. The defendants admitted the contract, but denied damages, and a further objection was raised to the suit, *viz.*, that the transaction was of a wagering character, and, as such, contrary to public policy, and was therefore void under ss. 23 and 30 of the Indian Contract Act.

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"It appeared from the evidence that the plaintiffs are up-country dealers in country produce; and that they occasionally sent up four or five bales of piece goods to the North-West Provinces; that about eight months ago they were induced by certain brokers of Government Securities to enter on the purchase and sale of Government Securities; and that the present one is one of their first transactions. The evidence further disclosed that the plaintiffs were at no time possessed of any Government Securities, but when the due date arrived, plaintiff Juggernauth went to his nephew Dann Mull, a broker in the firm of Peel Jacob and Company, and told him that he had sold Rs. 25,000 Government Paper to Ram Dyal and Chobnauth, the defendants, which would be due two days after, and that the broker in the transaction had promised to bring about a settlement, if not, he would have to tender the paper to the purchaser, and he asked Dann Mull to lend him Government Securities to that amount for the purpose of making a formal tender. No arrangement having been come to, the plaintiff Juggernauth, on due date, called on Dann Mull, who sent his durwan with him to Badul Chunder Dutt, with a request to accommodate him with Government securities of the value he wanted, which, if not used, would be returned to him. Juggernauth, accompanied by the durwan, went to Badul Chunder Dutt, who handed him the Government Securities required. Badul Chunder Dutt's evidence was that he did not sell the Government Papers to plaintiff; he therefore mentioned no price or rate to him, but merely lent the papers to him by way of accommodation.

"Without any endorsement he handed over the papers at 10 A.M. and got them back at 2 P.M. on the same date.

"The facts connected with the alleged tender of the papers proved in evidence were, that the plaintiff, accompanied by Dann Mull's durwan, called at the office of Mr. C. F. Pittar, an attorney, and got a letter from him addressed to the defendants, tendering the papers, and Dann Mull's durwan, Dew Sing, and the plaintiff, proceeded to the Broker's Exchange in New China Bazar, where they had expected to find the purchasers. They did not, however, find them there. The papers, however, were shown to one Tincoury, who sat in the same room, but who was

in no way connected with the buyers. The parties, thereupon, came back with the papers and at once returned them to their owner. All this happened on the 2nd September last, the due date. On the next day the plaintiffs caused an attorney's letter to be written to the defendants demanding the difference. The defendants in reply to this communication denied the tender altogether, and put forth a statement that the loss, if any, incurred by the plaintiffs had been fully made up by subsequent transactions between them, a statement which was not proved by evidence.

"The most important evidence in this case was that given by one of plaintiffs' own witnesses, Brindabun Chobay, which fully disclosed the real character of the transaction, and I have chiefly relied upon the testimony of this witness in taking the view which I have taken of the case, although he is father of the defendant Chobnath. This witness is a respectable person and a broker of Government Securities of 33 years standing; his evidence was that about five to seven lacs worth of such transactions take place daily, in which what was chiefly looked for was the difference on the market value of the securities between the date of purchase and that of delivery, and that in most instances there is no *bonâ fide* intention of taking delivery of the paper, and that the present was one of those transactions. If the transactions in Government Securities go up to forty or fifty lacs, about four lacs would only change hands, and that on the remainder of the transactions the parties are content with paying and receiving the difference, and that these transactions are like the bids upon the Government opium sale, popularly known as "Tazi Mandi," which is nothing more than gambling. That the inevitable consequence of these gambling transactions is, that a few persons become rich men while a very large number become beggars.

"I may add that, during my experience in this Court for the last twelve years, I have often found that men not possessed of any, or of only a very small amount of capital, recklessly enter into these dealings to the extent of lacs of rupees without possessing a single pice of Government Paper, and that it is very seldom that any paper is actually delivered or accepted, and all that is done is that a certain amount of difference, amicably

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settled, is paid and accepted, and that when the parties are unable to come to terms the squabble has found its way into the Small Cause Court. The question which I have the honor to submit for the decision of the High Court has never been distinctly raised in any of these cases so far as I am aware, both parties having been willing to treat these contracts as ordinary commercial transactions. In this particular case, the intention clearly was not a *bonâ fide* sale on one side, or a purchase on the other. The object was to speculate on the rise and fall of the market. Such being the real character of the transaction I have held it to be a gambling or wagering transaction, and as such opposed to public policy, and have held, under s. 23 of the Contract Act, that it is a contract void in law. In expressing my opinion of this particular transaction, I ought to say that I do not desire to be understood as saying that there might not be a *bonâ fide* sale of shares or securities or goods with a condition for future delivery, even when the seller was not possessed of the article at the time the contract was made. Such a sale is distinctly recognised by s. 88 of the Contract Act. These cases, however, in my opinion, stand altogether on a different footing. In this case I found, as a fact, that there was no real intention to complete the purchase, but merely to seek the difference, and that there was no legal tender of the securities. Having regard to these facts I am of opinion that the case clearly comes within the scope of ss. 23 and 30 of the Indian Contract Act, and *Grizewood* v. *Blane* (1). I have accordingly directed judgment to be entered for the defendants. But having regard to the importance of the point of law raised for the first time in this Court, I have made my judgment contingent upon the opinion of the Hon'ble Judges of the High Court upon the following questions, which I respectfully submit :—

"1*st*.—Whether upon the facts, as found by me, the contract was an agreement by way of wager, and, therefore, void within the meaning of s. 30, and contrary to public policy under s. 23 of the Indian Contract Act.

"2*nd*.—Whether the tender was a good legal tender.

(1) 11 C. B., 538

Mr. *T. A. Apcar*, for the plaintiff, contended that the contract was not a wagering contract, and referred to *Grizewood* v. *Blane* (1); *Thacker* v. *Hardy* (2); *Hilton* v. *Eckersley* (3); *Ram Lall Thacoorsey Dass's* case (4).

Mr. *Sale* for the defendant cited *Higginson* v. *Simpson* (5).

The opinion of the Court (GARTH, C.J., and WILSON, J.) was delivered by

GARTH, C.J.—The contract in this case, as I understand, was in writing; there was nothing ambiguous about its terms, and it appeared upon the face of it to be a contract for the sale and purchase of Rs. 25,000 Government Securities, to be delivered on the 1st or 2nd of September following.

The Judge of the Small Cause Court appears to have gone into the question upon oral evidence, whether the contract between the parties was really what it purported to be, or whether it was merely a wagering contract for differences without any intention by either party to carry out the sale and purchase of the securities.

Upon this question the Judge has decided that it was a wagering contract, and as such void under s. 30 of the Indian Contract Act, or contrary to public policy under s. 23 of that Act; and the first question submitted to us by the reference is, whether he was right in so holding.

Now, if it was competent to the Judge to determine *upon oral evidence* what the nature of the contract was, I should consider that we had no right to question his finding upon the facts; but it seems to me that under s. 92 of the Evidence Act it was not competent for the defendant to go into oral evidence for the purpose of varying or contradicting the express terms of the contract. There was no ambiguity about it, and I do not see why evidence was admissible to vary or contradict its terms.

In the case of *Grizewood* v. *Blane* (1) to which we have been

(1) 11 C. B., 538
(2) L. R. 4 Q. B. D, 685.
(3) 24 L. J. Q. B., 353.
(4) 4 Moore's I. A., 339.
(5) L. R. 2 C. P. D., 76.

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referred, the contract upon which the plaintiff declared was not for the sale and purchase of the shares in question, but for differences in the price of the shares on a given day; and the contract was of such a nature upon the face of it that the Jury might well find, as they did, that it was nothing more or less than a gambling transaction. It has since been doubted by very high authority, see *Thacker* v. *Hardy* (1), whether the Judge and Jury in *Grisewood* v. *Blane* (2) did not take an erroneous view of the transaction; but considering the view which they did take of it, it was undoubtedly a void contract under the English Gaming and Wagering Act.

And the same observation applies to another case which was cited in argument before us—*Higginson* v. *Simpson* (3). In that case the language of the contract was ambiguous, and it was certainly consistent with its terms that it was intended to be a gaming transaction.

Then it was argued by Mr. Sale that, although evidence is not admissible to alter or vary the terms of a written contract, it is admissible for the purpose of showing illegality; but a contract by way of gaming and wagering is in this country, as in England, *void* and *not illegal*. It is expressly made void by s. 30 of the Act; and it therefore cannot, in my opinion, be said to be illegal as being contrary to public policy. I have also considerable doubt whether oral evidence is admissible for the purpose of showing that the contract is in its nature illegal. So long as there is no ambiguity about it, the question whether it is illegal or not depends, as it seems to me, upon the terms of the contract itself.

I think, therefore, that evidence was not admissible for the purpose of varying the terms of the contract, and that the first question which is referred to us should be answered in the negative.

The second question is apparently founded on some misapprehension. It seems to have been taken for granted in the Court below, that a legal tender of the securities was absolutely

(1) L. R. 4 Q. B. D., 685. (2) 11 C. B., 339.
(3) L. R. 2 C. P. D., 76.

necessary; but this was not so. If the plaintiff was ready and willing to perform his part of the contract, that is to say, if he was in a position to transfer the securities on the 2nd of September, and did his best to inform the defendant by going to his place of business, that he was so, that would be sufficient, in the absence of evidence to the contrary, to constitute readiness and willingness.

If the plaintiff had the stock in his possession, as he says he had, there would seem every reason to suppose that he would be prepared to carry out the transaction.

No man, one would think, would ordinarily find any difficulty in completing such a lucrative bargain.

As this point however has not been decided by the Court below, the case must go back for that purpose.

The costs in this Court will abide the result of the judgment of the Court below.

PRIVY COUNCIL.

P. C.*
1882
December 1.

RADHAPERSAD SINGH (PLAINTIFF) *v.* RAM PARMESWAR SINGH AND OTHERS (DEFENDANTS).

[On appeal from the High Court at Fort William in Bengal.]

Costs—Set-off of costs ordered on the disposal of a preliminary point against costs awarded at the final disposal of the suit—Costs of partly successful appeal.

It is not the usual practice, when costs of an interlocutory proceeding have been disposed off, to consider that an award of the general costs of the suit interferes with the order as to the partial costs. A prior decree having given the costs incurred on the disposal of a preliminary point to the party successfully raising it, a later decree without expressly referring to the former, gave the costs of the suit, generally, to the opposite side. *Held*, that the costs due under the prior decree should be set off against those due under the later.

Although an appellant only partly succeeded in his appeal, the whole of his claim having been opposed in the Courts below on an untenable ground, *Held*, that there was no reason for departing from the general rule that the defeated party should pay the costs.

* *Present*: LORD FITZGERALD, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH, and SIR A. HOBHOUSE.

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RADHAPERSAD SINGH v. RAM PARMESWAR SINGH.

APPEAL from a decree of a Divisional Bench of the High Court (24th February 1879), reversing a decree of the Judge of the Shahabad District (3rd August 1878.)

A suit (for land) dismissed by the Subordinate Judge of the Shahabad district, upon the defence of limitation, was remanded (26th April 1869) for hearing on the merits; and it was ordered in the same decree that the defendants, respondents, should pay to the plaintiff, appellant, a certain sum for costs, with the costs incurred in the lower Court. The result of the hearing having been a decree in favour of the plaintiff as to part only of his claim, with proportionate costs to each party, another remand was obtained from the High Court, on this occasion to the District Judge, who also decreed partly in favour of the plaintiff, directing that each party should recover costs from the other in proportion to the success of each. To that decree was annexed a schedule of costs, including the costs recoverable by the plaintiff under the High Court's decree of 26th April 1869. The defendants then appealed successfully to the High Court, and on the 10th January 1874 the High Court reversed the decree of the District Judge, ordering that the plaintiff, then respondent, should pay to the defendants, then appellants, a certain sum for costs, and also costs incurred in the lower Court. Upon a further appeal to Her Majesty in Council, although the decree of 1874 was in part modified, this order for costs was in effect confirmed; the order in Council setting forth the amount of the costs of the appeal.

On the defendants' petition for exemption as to all costs, the plaintiff objected that he was entitled to set-off the sum decreed to him by the High Court on the 26th April 1869; and by the District Judge of Shahabad, Mr.. A. C. Brett, this set-off was allowed. But the High Court (AINSLIE and BROUGHTON, JJ.) held that the decree of 1874 had dealt with the whole question of costs in the suit as an open one; and on the construction of that decree, held that costs generally, and in the whole suit, had been given to the defendants. They, therefore, disallowed the set-off.

The present appeal was accordingly preferred.

The orders of the Indian Courts, necessary to be referred to in this report, fully appear in their Lordships' judgment.

Mr. *J. F. Leith, Q.C.*, and Mr. *R. V. Doyne*, appeared for the appellant.

Mr. *C. W. Arathoon* for the respondents.

The argument for the appellant traced the orders as to costs throughout the present litigation, and it was contended that the order of 26th April 1869 never having been reversed, required that effect should be given to it. Reference was made to s. 360 of Act VIII of 1859, the Code of Civil Procedure in force in 1869.

For the respondents reliance was placed on what had been done, and the orders made in the suit on and since the 10th June 1874. The construction placed on the decree of 1874 by the judgment now under appeal was correct.

Mr. *J. F. Leith, Q.C.*, replied.

Their Lordships' judgment was delivered by

SIR A. HOBHOUSE.—In this case there have been changes of parties, as frequently happens when a litigation extends over many years; but they have made no difference to the present question, and it will be convenient to speak of the appellant and respondents as if there was no change. So speaking of them, the appellant has been ordered to pay to the respondents the costs of a litigation with them. He now seeks to set-off against those costs the costs of a prior part of the same litigation which were awarded to him; and the question is whether his right to those prior costs has been displaced by a subsequent decree in the later part of the litigation. In the Court below the appellant was the plaintiff and the respondents were the defendants. The suit was for the recovery of certain lands; and the respondents set up a defence of the law of limitation. That issue was decided in their favour by the Subordinate Judge on the 31st July 1868, and in consequence the appellant's suit was dismissed. An appeal was presented to the High Court, who delivered judgment thereon on the 26th of April 1869. By their decree they reversed the decree of the Subordinate Judge, disallowed the defence of limitation, and ordered that the respondents should pay to the appellant the sum of Rs. 2,499-13-5, being the amount of costs incurred by

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him in the High Court with interest; and further ordered that the respondents should pay to the appellant the costs incurred by him in the lower Court with interest. With that order the suit was remanded. The litigation was then carried on with various fortune, and came up twice to the High Court. On the second occasion the High Court gave a final decree in favour of the respondents. That decree was pronounced upon the 10th June 1874, when the appellant's suit was dismissed, and he was ordered to pay the costs of the suit generally. The decree has been, so far as regards costs, affirmed by Her Majesty in Council; but the construction and effect of it is not in any way altered by that affirmation.

The respondents applied to the Subordinate Court for execution for their costs, and the appellant then claimed to set-off against the costs claimed by the respondents the costs which were due under the decree of the 26th April 1869. It may be well to mention that an application had been made by the appellant for payment of those costs soon after they were awarded to him, but it appears to have been thought proper that the question should stand over until the final determination of the suit. The amounts claimed for costs by the appellant were, first, the sum found by the High Court itself on the 26th April 1869 to be due for expenses in that Court; and, secondly, an amount of Rs. 5,806 odd, which were found by the Subordinate Court on a previous occasion to be due in respect of the regular suit, as it is called, disposed of by the Court of the Subordinate Judge on the 31st July 1868. Mr. Brett, the Judge of Shahabad, allowed those amounts to be set off by the appellant against the claim of the respondents, and he made an order to that effect on the 3rd August 1878. The respondents presented an appeal to the High Court, and on the 24th February 1879 the High Court reversed the order of the Subordinate Judge, and disallowed the claim of the appellant to set off the costs awarded to him in the decree of the 26th April 1869; and they gave to the respondents the costs of that appeal.

The ground taken by the High Court seems to be that the decree made on the 10th June 1874, giving the whole costs of the suit, overrode the decree of the 26th April 1869, which gives the costs

of a portion of the suit in which the respondents had failed. Their Lordships think that there is no ground for so construing the decree of 1874. The question of costs awarded by the decree of April 1869 was not before the Court in 1874; nor is it the usual practice, when costs of an interlocutory proceeding have been disposed of, to consider that an award of the general costs of the suit interferes with the order disposing of those partial costs. If there were any mistake in the prior order it ought to have been the subject of some review or rehearing, in which the Court should have had the subject brought to its mind. That was not the case, and their Lordships consider that it is neither the intention nor the effect of the decree of the 10th June 1874 to interfere with the costs awarded by the order of the 26th April 1869.

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It has been mentioned that there were two amounts claimed by the appellant under the decree of 1869. With regard to the first, the costs incurred in the High Court on the appeal decided in 1869, their Lordships consider that the appellant is entitled to set those off against the costs now claimable by the respondents.

With regard to the second amount, questions arise as to the items composing it. The first of those items, and the most considerable of them, is a sum of Rs. 3,245, which is the Court-fee. The Court-fee applies not only to the hearing in 1869 but to the whole of the ligitation; and, inasmuch as the general costs of the suit are awarded to the respondents, it would be improper that they should have to pay the Court-fee on account of their failure in the first stage of the suit.

The next item is a sum of Rs. 2,490 for pleader's fee; and it may be that a portion of that should be referred to the general costs of the suit, and not to the costs of the hearing of 1869. Their Lordships are not in a position to say how that matter is.

Under those circumstances their Lordships conceive that the proper order to be made will be: To discharge the order of the 24th February 1879; to declare that the appellant is entitled to the costs properly recoverable under the decree of April 1869; to declare that those costs consist of the sum of Rs. 2,499-13-5 mentioned in the decree of April 1869, and also such costs in the Court below as were occasioned by the defence of the law of limitation, and the costs of the trial and hearing

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thereon, and of the decree of the 31st July 1868; that it be referred to the Court of the Subordinate Judge of Shahabad to assess the last-mentioned costs upon that footing; and that the cause be remitted with a declaration that the costs when so assessed, together with the said sum of Rs. 2,499-13-5, are to be set off against the costs found due to the respondents. Interest should be charged as ordered by the decree of the 26th April 1869.

Their Lordships will make an humble recommendation to Her Majesty to that effect.

With regard to the costs of these latter proceedings, their Lordships have had considerable doubt, because the appellant does not wholly succeed; but having regard to the fact that the whole of the appellant's claim was opposed in the Court below upon a ground which their Lordships think entirely wrong, they do not see sufficient reason for departing from the sound general rule that the party who is defeated in the controversy that is raised shall pay the costs.

They, therefore, think it right that the appellant should have the costs of this appeal, and also the costs in the High Court.

Appeal allowed.

Solicitors for the appellant: Messrs. *Burton, Yeates, Hart,* and *Burton.*

Solicitors for the respondents: Messrs. *Henderson & Co.*

APPELLATE CIVIL.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Field.

1883 *March* 19.

MOHINY MOHUN DAS (PLAINTIFF) *v.* KRISHNO KISHORE DUTT AND OTHERS (DEFENDANTS.)*

Onus probandi—Suit for possession of land—Presumption of possession and ownership.

If, in a suit for possession of land which was covered with water more than twelve years before the institution of the suit, the plaintiff proves that he exercised acts of ownership, as by letting out the julkur to

* Appeal from Appellate Decree No. 698 of 1881, against the decree of Baboo Nobin Chunder Ganguli, Second Subordinate Judge of Furreedpore, dated the 31st January 1881, reversing the decree of Baboo Rosik Chunder Roy, Second Munsiff of Moolputgunge, dated the 11th March 1880.

tenants, that is *primâ facie* evidence of possession and ownership, and unless the defendant can make out a twelve-years' statutory title by adverse possession, the plaintiff's possession must be presumed to have continued, and it is not necessary for him to show a possession by acts of ownership within the twelve years.

Baboo *Chunder Madhub Ghose* and Baboo *Lal Mohun Das* for the appellant.

Baboo *Guru Das Banerjee* and Baboo *Bykanto Nath Das* for the respondents.

THE facts of this case sufficiently appear from the judgment of

GARTH, C.J.—In this case the Subordinate Judge has unfortunately taken an erroneous view of the law.

The subject of the dispute was a piece of land between two estates. It is admitted that one of these estates belonged to the plaintiff, and the other to the defendants. The question was, to which of the two the piece of land in question belonged.

Between these two estates there was a baor or water channel; and it seems to have been found by the Courts below that the land in question was formed by the silting up of this baor. Evidence was called on both sides to show at what time the silting up took place, or in other words, at what time the land in question, which was originally covered with water, became dry.

Upon that point the Subordinate Judge appears to have believed the defendants' witnesses in preference to those of the plaintiff. The defendants' witnesses said that the land became dry *more than twelve years before suit;* and the plaintiff's witnesses said that it became dry *within twelve years before suit.* It was upon the point of limitation that this evidence was offered.

Then, the only evidence adduced on either side as to the possession of the land during the time that it was covered with water, was given by the plaintiff. His witnesses proved that he had let out the julkur, or right of fishing in the water, which then covered the land in question, to certain tenants; and that under that letting they had exercised the right of fishing; and so far as appears this evidence was not contradicted.

Now, as regards these two points, namely, that of possession

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and that of limitation, the Subordinate Judge has dealt with the case in this way.

As to the question of possession, he finds, as I understand him, that there is no evidence to show that the land ever belonged to the plaintiff; because he says: "I cannot find that the land below the water of the baor belonged to the plaintiff, merely because he was in possession of the water by letting it out to tenants as julkur. This fact may show that he had an interest in the julkur superior to that of those tenants, or that he was the proprietor of the julkur; but this fact I do not consider sufficient for the purpose of finding that the land covered by water belongs to him. I cannot, therefore, find that the land belongs to the plaintiff."

Now, if the plaintiff really did give reliable evidence that he had let out the julkur to tenants, and that they under that letting had exercised the right of fishing there, I think that was clearly evidence, and strong evidence too, that the land covered by the water, over which the right of fishing was enjoyed, belonged to the plaintiff.

Primâ facie, in the case of land covered by water, the water belongs to the person to whom the land belongs; *cujus est solum, ejus est usque ad cœlum.* The owner of land is entitled, *primâ facie*, to everything either over or under it; and the ordinary, if not the very best means, of proving the ownership of land covered by water, is to show that rights of fishing have been exercised in and over the water. There are few other means of proving ownership over such land, except perhaps by working minerals, or carrying on other works below the surface of the soil.

And if the plaintiff in this instance proved such acts of ownership by fishing, they would clearly be *primâ facie* evidence of his possession and ownership, unless it could be shown that his taking the fish was referable to some other right or title.

And yet I understand the Subordinate Judge to say: "Assuming what the plaintiff's witnesses say with regard to these acts of ownership to be true, I consider it *no evidence of possession at all*, because it may be referable to some other right." He does not say to what right, nor is it even suggested that the plaintiff had any other right which would account for his ownership of the fishery.

I think, therefore, that the Subordinate Judge in this respect was clearly wrong. Unless there is some good reason for disbelieving the plaintiff's evidence, or unless it can be shown that these acts of ownership, which were exercised by the plaintiff in the julkur, are referable to some other right than the ownership of the soil itself, the Subordinate Judge was bound to give full and proper effect to the plaintiff's evidence.

But then the Subordinate Judge says: "Even assuming that I were to consider these acts of ownership as proving that the land covered by water belonged to the plaintiff, he is nevertheless barred by limitation; because he has not shown that the land which was covered with water has silted up and become dry within twelve years before suit; and it is therefore not shown that he has exercised any acts of ownership over the land within the twelve years."

Upon this point also I consider that the Subordinate Judge has taken a wrong view. In a case decided by a Full Bench of this Court only a few days ago *Mahomed Ali Khan* v. *Kajah Abdul Gunny* (1) the law upon this subject has been laid down very clearly.

In that case the question arose, (with reference to the law of limitation), how far it is necessary for the plaintiff, in cases of this kind, to prove a possession by acts of ownership within twelve years before suit. There is no doubt that he is bound to satisfy the Court that he has had a possession, and that he has lost that possession within the 12 years. The question is, how far it is necessary for him *to prove that possession by positive acts of ownership*, or how far the Court may presume in his favour from the fact of previous title and possession.

This is a question upon which some difference of opinion has prevailed in this Court, but which is now, I trust, satisfactorily settled. I regret that I was obliged to differ to some extent from my learned brothers of the Full Bench, but the difference is not one which affects the present suit. In such a case as this we were all agreed that possession ought to be presumed in favor of the plaintiff.

(1) *Ante*, p. 744.

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The principle laid down in that case by my learned brothers is as follows. I will read from their judgment:

"The true rule appears to us to be this, that where land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes—at such a time and under such circumstances that that state naturally would, and probably did, continue till within twelve years before suit, it may properly be presumed that it did so continue, and that the plaintiff's possession continued also, until the contrary is shown. This presumption seems to us to be reasonable in itself, and in accordance with the legal principles now embodied in s. 114 of the Evidence Act."

Now, applying that rule to the present case, it may be that, so long as the land was covered by water, the plaintiff might, as, in fact, he did, prove acts of ownership over it by the exercise of the right of fishing.

But it was proved to the satisfaction of the Subordinate Judge that previous to the twelve years the land emerged from the water, that is, the baor silted up, and from that time it, of course, became impossible for the plaintiff to prove acts of ownership over it by fishing.

Then it seems to have been found by the Munsiff—and there is nothing to the contrary found by the Subordinate Judge—that the land was waste, and did not become fit for cultivation until within six or seven years before suit.

This is, therefore, just one of the cases which are alluded to in the Full Bench judgment, and it discloses almost the same state of things which occurred in the case of *Radha Gobind Roy* v. *Inglis* (1), decided by the Privy Council. In that case the land in question had formerly been covered by a bheel or lake, and after the bheel became dry the defendants took possession of it. The plaintiff proved, *primâ facie*, his title to the bheel and possession of it in one of his ancestors, but he gave no proof of acts of ownership within the twelve years before suit. It did not appear clearly when the bheel became dry, and the defendants failed to prove possession of the land for twelve years before suit. Under these circumstances the Privy Council held that, as the plaintiff had proved a title to, and possession of, the bheel, his possession

(1) 7 C. L. R., 361.

must be presumed to have continued, unless the defendant could make out a twelve years' statutory title by adverse possession.

Unfortunately in this case the Subordinate Judge has taken a view, (which my brother Field tells me he has erroneously taken in other similar cases), that no such presumption can be made in favour of the plaintiff, but that he must show a possession by acts of ownership within the twelve years.

Here, again, therefore he is wrong. If it was shown that the plaintiff exercised acts of ownership over the land when covered by water, and that when the land became dry it was in such a state that it would be very difficult, if not impossible, to prove any acts of ownership over it, the Court might, and ought to, presume (according to the rule laid down in the Full Bench case), that the plaintiff's possession continued until the contrary was shown.

I think, therefore, that the case should be remanded to the Court below to be reconsidered, with due regard to the law laid down by this Court.

The costs in this Court and in the lower Appellate Court will abide the result.

FIELD, J.—I am of the same opinion on both points.

With reference to the question of limitation I shall merely refer to one more case in addition to those quoted by the very learned Chief Justice, that is the case of *Rao Karan Singh* v. *Raja Bakar Ali Khan* (1).

Then, with reference to the evidence as to the enjoyment of the julkur being evidence of title, I desire to add that, under the special circumstances of this particular case, it appears to me that the evidence of possession and enjoyment of the julkur ought, if believed and unrebutted, to be taken to be good evidence of the title to the land. I say under the special circumstances of this particular case, because there are cases in this country in which it might be impossible to consider evidence of the ownership and enjoyment of a julkur to be evidence of the title to the land covered by the water, for example, the case of a julkur in a deep and navigable river. In the present case, the water which forms the julkur is a small piece of water in a small estate. The

(1) L. R. 9 I. A., 99.

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enjoyment of that julkur would presumably belong to the owner of the estate, unless he had leased it out to tenants. It would follow that if the owner of the estate could show that he had enjoyed the julkur, this would be good evidence that the land under the julkur belonged to him, that is, in the absence of any suggestion, which has not been made in this case, that his enjoyment of the julkur was referable to a lease of an incorporeal right taken from a third party.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

1883 February 19.

MUSYATULLA (DEFENDANT) *v* NOORZAHAN (PLAINTIFF).*

Landlord and Tenant—Ejectment—Right of Occupancy—Forfeiture—Beng. Act VIII of 1869, s. 52.

The mere omission to pay rent for five years does not of itself amount to forfeiture of a ryot's right of occupancy, and will not be sufficient to sustain an action by the landlord for the recovery of the ryot's holding.

A ryot having a right of occupancy cannot be legally ejected, unless under an order regularly obtained under s. 52 of the Rent Law, that is, under a decree for arrears of rent unsatisfied within fifteen days from the passing of the decree.

THIS was a suit for ejectment and khas possession. It was found as a fact that in 1882 (1875-76) the defendant had a right of occupancy in the lands in dispute; that he paid no rent for the years 1283, 1284, 1285, or 1286; and that a notice to quit had been served upon the defendant on the 28th of Pous 1286 (11th January 1880), requiring him to give up possession by the end of Cheyt 1286 (*i.e.*, before the 12th of April 1880). The Court of first instance gave the plaintiff a decree on the authority of *Ilem Nath Dutt* v. *Ashgur Sirdar* (1), and this decree was affirmed on appeal. The defendant appealed to the High Court on the following grounds, amongst others :—

(1.) That under s. 22, Beng. Act VIII of 1869, the learned Judge below appears to have erred in holding that your petitioner's

*Appeal from Appellate Decree No. 661 of 1882, against the decree of F. Comley, Esq., Judge of Purnea, dated the 21st January 1882, affirming the decree of Baboo Lal Behary Dey, Munsiff of Kissengunge, dated the 19th September 1881.

(1) I. L. R., 4 Calc., 894.

right of occupancy was terminated by the notice to quit, alleged to have been served upon your petitioner.

(2.) That the right of occupancy once acquired cannot be lost for the omission to pay rent for some years.

(3.) That the plaintiff having not brought his suit under s. 52, Beng. Act VIII of 1869, upon the ground of your petitioner's omission to pay rent, the lower Appellate Court was wrong in law in relying upon it for deciding the case in favour of the plaintiff.

Mr. *Twidale* for the appellant.

Baboo *Saligram Singh* for the respondent.

The judgment of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

PRINSEP, J.—The plaintiff sues to eject the defendant, stating that he has no occupancy rights, and that notice to quit has been regularly served on him.

It has been found by the lower Appellate Court that the defendant and his father have been actual cultivators for many years, and that the defendant in 1282 had acquired rights of occupancy; but the District Judge goes on to find that inasmuch as, on the defendant's own admission, he has paid no rent to any one for five years, he has lost those rights of occupancy, and consequently is liable to be dispossessed after notice.

It has been settled by the judgment of a Division Bench of this Court in the case of *Duli Chund* v. *Rajkissore* (1), and we agree in that judgment, that a ryot having a right of occupancy cannot be legally ejected unless under an order regularly obtained under s. 52 of the Rent Law, that is to say, under a decree for arrears of rent unsatisfied within fifteen days from the date on which it was delivered. The suit in its present form therefore is bad and must fail.

We think it necessary also to point out to the District Judge that even if a ryot who has acquired a right of occupancy fails to pay rent for five years, he does not necessarily forfeit that right unless it can be proved that he has abandoned the land,

(1) *Ante*, p. 88. 11 C. L. R., 326.

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or a decree for ejectment, which would be operative under s. 52, has been passed against him.

The decrees of the lower Courts will be set aside, and the suit dismissed with costs in all the Courts.

Appeal dismissed.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

1883 *March 2.*

SHARAT CHUNDER GHOSE AND OTHERS (PLAINTIFFS) *v.* KARTIK CHUNDER MITTER AND ANOTHER (DEFENDANTS).*

Suit by minor—Infant—Minor—Compromise of Suit—Leave of Court.

Where a compromise of a suit is entered into on behalf of an infant defendant, the approval of the Court to such compromise must be express, and will not be inferred from the subsequent passing of a decree in terms of such compromise. Without such approval, the compromise will not bind the infant, and will be set aside at his instance.

Rajagopal Takkaya Naiker v. *Subramanya Ayyar* (1), cited and followed.

THE facts of this case are as follows: Some time previously to the year 1860 one Raj Kristo Bose died, leaving him surviving one son, Khetter Nath Ghose, and one daughter, Modhumoti Dassee. Khetter Nath died in 1861, and was succeeded by his widow and heiress Showrobini, who died in 1875. The plaintiffs are the three sons of Modhumoti Dassee. On the 25th of November 1873 Showrobini executed a bond in favour of the defendant Kartik Chunder Mitter for Rs. 1,500, who, on the 10th of March 1877, filed a suit for the recovery of the amount of the bond and interest—in all, Rs. 2,388, against Modhumoti as guardian of the plaintiffs, who had succeeded to the estate of Khetter Nath on the death of Sowrobini in 1875. (Modhumoti, it should be mentioned, had been appointed guardian of the minors by the Judge of the District Court under the provisions of Act XL of 1858). On the 13th of March 1877, Modhumoti's pleader filed a deed of com-

* Appeal from Appellate Decree No. 869 of 1882 against the decree of T. Smith, Esq., Judge of East Burdwan, dated the 1st March 1882, reversing the decree of Baboo Bhupotty Roy, Subordinate Judge of that District, dated the 27th December 1880.

(1) I. L. R., 3 Mad., 103.

promise, by which Modhumoti agreed to pay in full satisfaction of Kartik Chunder Mitter's claim a sum of Rs. 1,600, payable in three instalmonts, and a decree was passed in accordance with the terms of this deed. The present suit was filed by the plaintiffs to have it declared that that decree was not binding on the plaintiffs nor on the estate inherited by them from their uncle Khetter Nath.

On the merits the Subordinate Judge fixed the following issues: (1), whether the deed of compromise on which the decree was founded was filed *bonâ fide* on behalf of plaintiffs' mother and with her permission; and, if so, whether it was for the benefit of the minors; (2), whether Showrobini contracted the debt for the benefit of Khetter Nath's estate, and whether she was legally competent to do so; (3), whether the act of Showrobini, who had a life interest, is binding on the reversioners the plaintiffs; (4), whether the plaintiffs are entitled to the relief sought for, namely, a declaration to set aside the decree. The Subordinate Judge found all the issues in the plaintiffs' favour, and he decreed the suit with costs. On appeal the District Judge reversed the Subordinate Judge's finding on the first issue, and dismissed the suit, citing *Lekraj Roy* v. *Mahtab Chand* (1). The plaintiffs appealed to the High Court.

Baboo *Bhowany Churn Dutt* and Baboo *Chunder Madhub Ghose* for the appellants.

Baboo *Tarruck Nath Sen* and Baboo *Rashbehary Ghose* for the respondents.

The judgment of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

PRINSEP, J.—On the 10th of March 1877 Kartik Chunder Mitter brought a suit against the present plaintiffs, as represented by their mother and guardian Modhumoti Dassee, to recover a sum of money said to have been borrowed by Showrobini, a Hindu widow then in possession of the estate, which has since passed from her hands. Three days later, and before any proceedings had been taken on the plaint to that suit, in fact before even summonses had been issued, Modhumoti's pleader filed a petition

(1) 10 B. L. R., 35: 14 Moore's I. A., 393.

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of *ekbaljamah*, consenting to a decree in favor of Kartik Chunde for a portion of the amount sued for. A few days later a decree was passed in accordance with this petition. One of the three minor defendants in that case has now attained majority, and for himself, and also on behalf of his minor brothers, sues to get rid of the effect of that decree in consequence of its having been put into execution against him by the attachment of some of his property.

The District Judge on appeal has merely considered the manner in which the compromise was effected in which the decree was passed. On the facts, which have been stated, and also because he considered that the minors were sufficiently advised by their maternal uncle Brojendro Ghose and their relative Bishembur Bose, the District Judge has held that the decree was binding against them.

Whatever may have been the practice of our Courts regarding their duty in accepting compromises on behalf of minors in pending suits, and in embodying them in the terms of the decree, it is quite clear to us that since July 1871, that is to say since the decision of the Privy Council in the case of *Abdul Ali* v. *Mozuffer Hossein Chowdhry* (1), the procedure of our Courts should have been guided by the rule laid down by their Lordships in that case. Their Lordships state that, "if there really had been an honest compromise made, the practice of the Court is quite plain as to how that compromise ought to have been carried out. It ought to have been carried out by proper deeds and filed in Court, particularly where infants were concerned, so as to have had the assent of the Court at the time instead of its being totally concealed from them." The rule laid down in that case has since been adopted by the Legislature in enacting s. 462 of the present Code of Civil Procedure. It has been laid down by the Madras High Court in *Rajagopal Takkaya Naiker* v. *Subramanya Ayyar* (2), that the approval of the Court of a compromise thus effected must be express, and cannot be inferred from the subsequent passing of a decree in accordance with the terms of the compromise. We agree with that judgment,

(1) 16 W. R., P. C, 22.
(2) I. L. R, 3 Mad, 103.

and in applying it to the present case we think that the decree of the 27th March 1877 is inoperative as against the plaintiffs in the present case. The parties consequently will be placed in the position that they occupied before that decree was passed, but with the consent of the pleader for the respondents, we think that the liability of the plaintiffs to the debt incurred by Showrobini, which can be conveniently tried in the present suit on the second and third issues, should be so tried. These issues have been determined by the Court of first instance, and therefore it remains for the lower Appellate Court to come to a distinct finding on them. For this purpose we direct that the case be remanded to the lower Appellate Court for trial on its merits. We would add that, in the event of the debt being found binding on the present plaintiffs, they will be liable for the whole amount, and not merely for the amount stipulated on their behalf in the compromise.

Costs will abide the result.

Case remanded.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

BACHARAM MUNDUL (DEFENDANT) *v.* PEARY MOHUN BANERJEE (PLAINTIFF.)*

1883 *March* 2.

Onus probandi—Resumption, Suit for—Lakheraj—Rent-free lands—Landlord and Tenant.

In suits for the resumption of lands alleged by the defendant to be lakheraj, the burden of proof is in the first instance on the plaintiff to show that the lands are *mal*. The fact that the defendant is a tenant of the plaintiff's is a matter to be taken into consideration by the Court in determining whether, on the facts of the case, the plaintiff has made out a *primâ facie* case; but unless the Court finds that the plaintiff has made out a *primâ facie* case, judgment should be given for the defendant.

Hurryhur Mukhopadhya v. *Madhub Chunder Baboo* (1); *Akbar Ali* v. *Bhy Ea Lall Jha* (2); and *Nowaj Bundopadhya* v. *Kali Prosunno Ghose* (3), cited.

* Appeal from Appellate Decree No. 708 of 1882, against the decree of Baboo Promotho Nath Mukerjee, Subordinate Judge of Burdwan, dated the 27th March 1882, reversing the decree of Baboo Chunder Coomar Dass, Munsiff of Boodbood, dated the 4th January 1881.

(1) 8 B. L. R., 566: 14 Moore's I. A., 153. (2) I. L. R., 6 Calc., 666.

(3) I. L. R., 6 Calc., 543.

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IN this case, the plaintiff who is the talukdar of monzah Bhuri, pergunnah Bhaga, in the district of Burdwan, sued one Bacharam Mundul, and nine others, named Pal. These latter defendants had been holders of a jote within the plaintiff's taluk, which jote yielded a jama of Rs. 30-5-6½, and was registered in the name of one Manikram Pal, deceased. In 1879 the plaintiff obtained a decree for rent against all the Pal defendants. In execution of that decree he attached the tenure under s. 59 of the Rent Law, and gave a schedule of all the lands comprised in the jote. The defendant Bacharam preferred a claim to three of those plots, alleging that they were lakheraj lands, and that he had purchased them as such from five of the Pal defendants, the owners thereof. This claim was allowed on the 17th of January 1880; and on the 1st of July 1880, the plaintiff brought the present suit for a declaration that the lands were not lakheraj but were comprised in the tenure registered in the name of Manikram Pal; and for possession. Bacharam Mundul's defence was that the lands claimed are lakheraj, and that he is in possession of the same.

The Court of first instance found that each party had failed to prove the case set up by him, and, throwing the *onus* on the plaintiff, dismissed the suit with costs. On appeal the Subordinate Judge said: "The evidence on both sides has been held by the lower Court to be equally unsatisfactory. The decision of the case therefore hinges on the question of onus. It seems to me the lower Court has wrongly placed the onus on the plaintiff under the rulings of the High Court—*Akbar Ali* v. *Bhy Ea Lall Jha* (1); *Newaj Bundopadhya* v. *Kali Prosunno Ghose* (2).

The Subordinate Judge then referred to *Sheeb Narain Roy* v. *Chidam Doss Byragee* (3); *Gungadhur Singh* v. *Bimola Dossee* (4); *Ram Narain Singh* v. *Bistoo Thakoor* (5); *Khorshed Ali* v. *Dhoondharee Singh* (6), which had been cited for the defendant, and, holding that the onus lay upon the defendant to prove his lakheraj title, reversed the judgment of the Court of first instance

(1) I. L. R., 6 Calc., 636.
(2) I. L. R., 6 Calc., 543.
(3) 6 W. R. (Act X), 45
(4) 5 W. R., (Act X), 37.
(5) 15 W. R., 299.
(6) 20 W. R., 457.

and gave the plaintiff a decree. The defendant appealed to the High Court.

Baboo *Kaly Churn Banerjee* for the appellant.

Baboo *Rash Behary Ghose* for the respondent.

The judgment of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

PRINSEP, J.—The plaintiff in this case sued to recover possession of certain lands as *mal*, on the ground that his title had been impugned by an adverse order in the case No. 1654 of 1879. The defendants denied that the lands were *mal*, and claimed them as their rent-free holding.

The first Court dismissed the suit. On appeal the Subordinate Judge was of opinion that the onus of proving that the land was lakheraj lay upon the defendants, and finding that they had not proved it to be so, he decreed the claim. The findings of fact upon which his decision is based are—*first*, that the defendants are the plaintiff's tenants in respect of certain *mal* lands; and, *second*, that the lands which are alleged to be lakheraj, and which form the subject of this suit, are within the ambit of the plaintiff's zemindari. In the case of *Hurryhur Mukhopadhya* v. *Madhub Chunder Baboo* (1), their Lordships of the Privy Council declared that in suits for the resumption of lands alleged to be held as lakheraj the onus lies on the plaintiff. They said: "The only other point to be decided on this appeal is, whether there is any peculiarity in this case, which ought to take it out of the general rule. Their Lordships are of opinion that there is not. Mr. Doyne argued that the defendants had admitted that the lands in question, with the exception of the small quantity no longer claimed, were within the appellant's estate; but such an admission is obviously not sufficient to meet the burthen of proof thrown upon the plaintiff. It was at most an admission that the lands were within the ambit of the estate, not that they had ever been *mal* lands—in fact the defendants strenuously asserted the contrary. The appellant, therefore, having failed to give any evidence on the second trial in support of his amended plaint,

(1) 8 B. L. R., 566: 14 Moore's I. A., 153.

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the decree dismissing his suit was right." In this case, as in that, the lands are within the ambit of the plaintiff's zemindari, and as there, so here, the defendants assert that the lands are lakheraj. The Privy Council decision just quoted is binding on this Court, and has been followed by the decisions in *Arfunnessa* v. *Peary Mohun Mookerjee* (1), and *Koylash Bashiny Dossee* v. *Gocool Moni Dossee* (2).

It has, however, been argued before us that where a tenant holds lands in a zemindari, if he claims any other lands as lakheraj, the onus is shifted from the plaintiff to the defendant, and in support of this contention two cases have been brought to our notice. The first is the case of *Akbar Ali* v. *Bhy Ea Lall Jha* (3). In that case if we take certain paragraphs by themselves, it certainly would appear that something in the nature of the proposition now contended for was laid down, but when we turn to the decision of the Chief Justice Sir Richard Garth, we find in his statement of the facts that the land in dispute was included within the ambit of the *mal* land held by the defendant, and he came to the conclusion that under the whole circumstances of the case the onus was on the defendant. The next case cited is that of *Newaj Bundopadhya* v. *Kali Prosunno Ghose* (4) reported in 8 C. L. R., p. 7. There the Judges laid down that the onus lay upon the defendants; but no doubt the decision turned on the special facts of the case, and these are not given in the report.

In neither of these cases was the judgment of the Privy Council, to which we have already referred, or the subsequent case which followed it *Arfunnessa* v. *Peary Mohun Mookerjee* (1) quoted. We do not understand these cases to decide that if in an estate a man held one piece of land in one corner and another piece in another corner, because he paid rent for the former the onus would lie on him to prove his lakheraj title to the latter. Indeed this would be distinctly opposed to the view laid down by the Judicial Committee of the Privy Council. What their Lordships held was that the onus lay on the plaintiff, and he must prove that the land in dispute was part of the *mal* land of his estate, and that he could do, either by proof of receipt of rent or that its proceeds were taken into account at the perma-

(1) I. L. R., 1 Calc., 378.
(2) I. L. R., 8 Calc., 230.
(3) I. L. R., 6 Calc., 666.
(4) I. L. R., 6 Calc., 543.

nent settlement, or by any other sufficient means. And they distinctly declared that, unless plaintiff could make out a *primâ facie* case, that is a case in which he would be entitled to a decree if the defendant did not produce evidence, his suit should be dismissed.

In the present caseit appears from the schedule to the plaint that the land in dispute is surrounded by other lands held by the defendants for which rent is paid. This is a matter which should be taken into consideration in dealing with the case. If it be true, as stated in the plaint, that the land is so surrounded by ryotti lands of the defendants, it is some evidence to go before a Jury or Judge to show that the land forms part of the tenure of the defendants, and is not their lakheraj holding. But no decree can be passed adversely to the defendants on it, unless the Judge is of opinion that it establishes a *primâ facie* case of the nature already described.

The case will be remanded to the Subordinate Judge in order that he may decide whether the land belongs to the tenure of the defendants, or, as is asserted by them, is their lakheraj holding.

Costs will abide the result.

Case remanded.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

UPENDRA NARAIN MYTI (PLAINTIFF) *v.* GOPEE NATH BERA AND OTHERS (DEFENDANTS.)*

1883 *March 9.*

Hindu Widow—Reversioner—Declaratory Decree—Waste by Hindu Widow—Compromise by Hindu Widow—Setting aside compromise—Joint Family—Separation—Partial Separation.

Where the next reversioner after a Hindu widow sues, during the lifetime of the widow, for a declaration that a compromise made by her is not binding on him, it is no sufficient ground for refusing the declaration that the plaintiff may not succeed for many years to the possession of the property, or that some of the property is of a perishable nature.

The separation of one member of a joint Hindu family does not

* Appeal from Appellate Decree No. 339 of 1882, against the decree of F. W. Badcock, Esq., Officiating Judge of Midnapore, dated the 27th December 1881, reversing the decree of Baboo Jodu Nath Roy, First Subordinate Judge of that district, dated the 27th September 1880.

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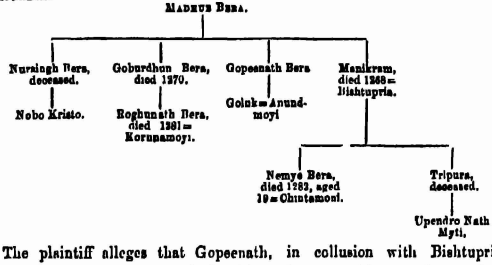
necessarily create a separation between the other members nor cause the general disruption of the family.

Radha Churn Dass v. *Kripa Sindhu Dass* (1), dissented from.

IN this case the judgment appealed from is as follows :—

The plaintiff brought a suit for declaration under Act I of 1877 to declare a certain deed of compromise executed by the defendants void as regards his rights as reversionary heir. He obtained a decree, against which the defendant has appealed. It appears that Madhub Bera died leaving four sons, who lived together as an undivided family till 1264 (1857). In that year, as the plaintiff alleges, Nursingh Bera separated himself, but the other three went on living as an undivided family till 1284 (1877). The defendants deny this, and say that the four brothers lived together till 1264, and then separated, and were never re-united.

In February 1878, Korunamoyi instituted a suit against Gopeenath and Chintamoni for the share of the whole property which came to her through her deceased husband Roghunath. This suit was compromised by the solehnama to which the plaintiff now objects. The defendant Gopeenath in the solehnama agrees to give Chintamoni 15 bighas of land and Korunamoyi 25 bighas, and Korunamoyi for herself, and Bishtupria as guardian of Chintamoni, agree to give up all rights to the property of their deceased husbands.



The plaintiff alleges that Gopeenath, in collusion with Bishtupria, executed the solehnama with the object of injuring his reversionary right to the property left by Nemye Bera. This appears to me to be an allegation of fraud on the part of Bishtupria, and part of the relief the plaintiff asks for is that the solehnama may be declared fraudulent.

The principal points raised in appeal are as follows: *First.*—The plaintiff is the next reversionary heir, and therefore cannot bring any suit. *Second.*—This is not a case where, in the exercise of sound discretion, a declaratory decree should be made. *Third.*—The plaintiff should have brought a suit for appointing a manager to the estate, and not having

(1) I. L. R., 5 Calc., 474.

done so, the provision in Act I of 1877, s. 42, precludes him from suing for a declaratory decree. *Fourth.*—The plaintiff alleges that Nursingh Bera separated in 1864. As no partial separation of a Hindu family can take place, the plaintiff should have proved that the remaining three brothers formally re-united. He has not done this, and therefore the family must be considered as divided. *Fifth.*—The lower Court's finding on the evidence that the plaintiff's account of the separation of the family was not correct.

As regards the first point, I have not been able to find any precise definition of the term reversionary heir, but it appears to me that the plaintiff is the heir, because on the death of Chintamoni and Bishtupria, he will be entitled to the property as the heir of Nemye Even supposing, however, that he is not the next reversionary heir, I should, on the authority of the cases of *Shama Sundari Chowdrain* v. *Jumoona Chowdrain* (1), and *Retoo Raj Panday* v. *Lallje Panday* (2), consider that he had the right to institute a suit. It is quite true that in those two cases, the grounds on which a remote reversionary heir can sue are that the holder of the property has committed waste and fraud, and that the lower Court has not in this case found that Bishtupria acted fraudulently, but I think the nature of the compromise, supposing the plaintiff's account of the separation to be true, shows that Bishtupria must have acted fraudulently. If it is true, that in 1284 the family was joint, then Bishtupria could have claimed some 60 bighas, and abandoned all her claims. I think this can hardly be considered as a mere act of waste, and the plaintiff himself distinctly alleges it to be fraudulent. I, therefore, consider that the plaintiff was justified in bringing a suit, though whether he is entitled to a declaratory decree will be considered further on. The next point is that this is not a case in which the Court would, in the exercise of a sound discretion, grant a declaratory decree. The plaintiff is a minor and Chintamoni is also a minor, and it may, therefore, be reasonably supposed that many years may elapse before the plaintiff can inherit the property, and it is, of course, quite possible that he may not inherit at all. The case of *Hunsbutti Kerain* v. *Ishri Dutt Koer* (3) is the latest case that has been brought to my notice, and that lays down very clearly the cases where declaratory decrees should not be granted. The case of *Sri Narayan Mitter* v. *Krishna Sundari Dasi* (4) quoted in the above case, shows that the granting of such decrees is entirely within the discretion of the Court. The lower Court in its judgment says: "Her (Bishtupria's) assent is prejudicial to the plaintiff's cause which he may not be in a position to substantiate after all the evidence shall have been taken away or destroyed by lapse of time." From this it appears that the lower Court considered that a decree should be granted, because there is no power to entertain a suit to perpetuate evidence, but in the passage quoted at

(1) 24 W. R., 86.
(2) 24 W. R., 399.
(3) I. L. R., 5 Calc., 512.
(4) 11 B. L. R., 171.

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I. L. R., 5 Calc., p. 519, the Privy Council appear to have held that this is not a proper reason for making such decrees. In this case, indeed, as the separation, according to the plaintiff, took place so late as 1284, there is as yet certainly no ground for thinking that the evidence will be destroyed for some time. The inconvenience of granting such decrees is evident from the concluding part of the lower Court's order, where the plaintiff is declared to be entitled on the death of Chintamoni and Bishtupria, to a one-third share of some cattle and paddy. This part of the order is, I think, quite useless, as by the time the plaintiff inherits, the cattle and paddy will probably not be in existence; if they are, their value will have decreased. Under all the circumstances, I do not think that this is a case where a declaratory decree should be passed.

The next point is that the plaintiff could have brought a suit for the appointment of a manager, and that as he has not done so, he is not entitled to a declaratory decree. On the authority of the two cases previously quoted, *Shama Soondures Chowdhrain* v. *Jumoona Chowdhrain* (1), and *Retoo Raj Pandey* v. *Lallyee Pandey* (2), I think the plaintiff might have brought such a suit.

The Subordinate Judge also appears to have been of the same opinion, as he apparently only abstained from appointing a manager, because the plaintiff had only asked for a declaratory decree, and had brought the suit on a stamped paper sufficient for that purpose only. The remarks of the Subordinate Judge on the seventh issue lead me to suppose that, had the plaintiff brought a suit for the appointment of a manager on a properly stamped paper, the lower Court would have given him a decree, appointing a manager. Whatever view, however, the lower Court might have taken of a suit for appointing a manager, it was, I think, quite within the power of the plaintiff to bring such a suit; and as he has omitted to do so, I do not think that the lower Court could make a declaratory decree. The terms of the proviso in s. 42 of Act I of 1877 are explicit, and do not leave the Court any option in the matter.

As regards the fourth point, the lower Court appears to have found that the plaintiff's account of the separation of Nursingh Bera in 1264 is true, and that a division of the property of the family took place then. If that is so, I think that the cases of *Ramhari Surma* v. *Trihi Ram Surma* (3), and of *Radha Churn Das* v. *Kripa Sindhu Das* (4), shew that proof of subsequent reunion by agreement is necessary. It appears that the division of the joint property breaks up the family, and makes the usual presumption regarding members of a family living together fail, and that the party wishing to shew that members of a family who continued to live together, after such division, are joint, must adduce proof that the members by agreement have re-united themselves into a joint

(1) 24 W. R., 86.

(2) 24 W. R., 399.

(3) 7 B. L. R., 337 : 15 W. R., 442.

(4) I. L. R., 5 Calc., 474.

family; and that mere proof of commensality is not sufficient. There is certainly no proof of any such agreement, and, therefore, the plaintiff's contention that the three other brothers continued to live together as a joint family, after Nursingh's separation, is not properly established.

The District Judge then reversed the decision of the Court of first instance and dismissed the plaintiff's suit with costs. The plaintiff appealed to the High Court.

Mr. *Twidale* and Mr. *Mendies* for the appellant.

Baboo *Mohiny Mohun Roy* and Baboo *Saroda Persad Roy* for the respondents.

The judgment of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

PRINSEP, J.—Madhub Bera died leaving four sons, who admittedly formed a joint Hindu family. In 1264 Nursingh the eldest separated from his brothers. In 1878, Korunamoyi, the widow and heiress of the son of the second brother Goburdhun, sued the third son Gopeenath, the third brother, and Chintamoni, the widow and heiress of the son of the fourth brother Manikram (deceased), for her share of the family property. That suit ended in a solehnama or compromise under which Gopeenath, on the one hand, agreed to give up 25 bighas to Korunamoyi and 15 bighas to Chintamoni, while Korunamoyi for herself and Bishtupria, the mother-in-law and guardian of Chintamoni, on the other hand agreed to give up all rights to any family property of the brothers whom they represented.

The plaintiff, a minor, being the son of a daughter of the fourth son Manikram the fourth brother as reversionary heir after Chintamoni and Bishtupria Hindu widows having only a life interest, sues to have it declared that this solehnama was collusively obtained, and is therefore inoperative as against him, and that he is entitled on the death of these ladies to obtain a one-third share of the family estate held by the three brothers jointly after Nursingh had separated from them.

The District Judge in appeal has, in exercise of his discretion, refused to give plaintiff a declaratory decree, first, because, as he remarks many years may elapse before plaintiff can inherit the property, and it is, of course, quite possible that he may not

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inherit at all. He next seems to think that the object of giving a declaratory decree in a case of this description is to perpetuate evidence, and that this is not a valid ground for exercising the discretion vested in him by law. Lastly, he thinks that, owing to the perishable nature of the movable property claimed, a decree, which is not likely to be operative until that property has disappeared or altered in value, should not be passed.

It appears to us that the District Judge has not exercised a proper discretion in refusing to give plaintiff a declaratory decree, if he has established his right to set aside the compromise.

The perishable nature of some of the movable properties claimed, and the consequent improbability that they would all be in existence or in their present form when the plaintiff's right to inherit may accrue, is not a valid reason for refusing to set aside any deed or decree which interferes with his right as reversioner.

The District Judge has, however, proceeded to hold that the present suit is untenable, because the plaintiff has not sued for the appointment of a manager to take charge of his share of the family property in consequence of the waste committed by the widows. But, as has been already pointed out, this is not a suit to restrain the widow from committing waste, but to set aside a compromise which is, if at all, only voidable by the plaintiff.

Lastly, the District Judge, in concurrence with the first Court, has held as Nursingh the eldest of the four brothers separated in 1264, "a division of the family then took place;" that there is no proof of any agreement on the part of the other three brothers to re-unite; that mere proof of commensality is not sufficient; and that consequently the plaintiff's suit must fail on this ground also.

The first point then for our consideration is, whether the separation of one member of a joint Hindu family necessarily creates a separation between the other members, and causes the general disruption of that family.

If this be so, then it will be for us to determine whether any specific agreement between the other members is absolutely necessary for proof of their re-union, and whether it cannot be presumed from their subsequent conduct.

On the first point we have been referred to the case of *Radha Churn Dass* v. *Kripa Sindhu Dass* (1), as an authority for deciding it in the affirmative.

On the other hand we have considered the observations of their Lordships of the Privy Council in the cases of *Rewan Persad* v. *Mussamut Radha Bibee* (2), and *Mussamut Cheetha* v. *Miheen Lall* (3), neither of which cases were laid before the Division Bench, which decided the case first mentioned. The judgment of their Lordships in the case of *Rewan Persad* (p. 168) is in the following terms :—

"We think that it may be admitted that the *primâ facie* presumption, where there are no circumstances to affect it, is that every Hindu family of this class was an undivided family, and, consequently, this presumption must prevail, unless the circumstances of this case lead to a contrary conclusion. We must, therefore, consider the circumstances, having, however, first directed our attention to some points of Hindu law which may have a bearing upon the conclusion to be drawn from the facts.

"First: We apprehend it to be undisputed that a division may be affected without instrument in writing. Secondly: That a division may be either total or partial. Thirdly: That a separation from commensality does not, as a necessary consequence, effect a division, or, at least, of the whole undivided property."

Moreover, we find their Lordships in the well known case of *Deen Dyal Lall* v. *Jugdeep Narain Singh* (4) again recognizing the continuance of the joint estate of a family after a partition so as to separate the share of one member. It was in that case held that, although a member of a joint family could not alienate his share in the family estate, the purchaser of his rights in execution of a decree against him, could, by insisting on a partition so as to definitively ascertain those rights, obtain possession of a distinct portion of that estate which represented them.

The judgment proceeds thus:

"It seems to their Lordships that the same principle may and

(1) I. L. R., 5 Calc., 474

(2) 4 Moore's, I. A., 137

(3) 11 Moores' I. A., 369 (See p. 380).

(4) L. R., 4 I. A., 247 (See. p. 255) : S. C. I. L. R., 3 Calc., 198.

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ought to be applied to shares in a joint and undivided Hindu estate, and that it may be so applied without unduly interfering with the peculiar status and rights of the copárceners in such an estate, if the right of the purchaser at the execution sale be limited to that of compelling the partition, which his debtor might have compelled had he been so minded before the alienation of his share took place."

From those observations we understand that it was not disputed in argument, and it was accepted by their Lordships as a rule of Hindu law, that the separation of one member of a Hindu family does not in itself affect the position of the other members *inter se*. In the case of *Mussamut Cheetha* (1) their Lordships (p. 380) thus describe the state of the family of the parties to the suit:—

"The family originally consisted of three brothers—Shama Dass, Damodur Dass, and Koonj Kishore Dass. It is admitted on all hands that Shama Dass separated himself from his brothers, and took his share of the ancestral estate as separate property. It is, however, clear upon the evidence (and if the fact be not admitted, it is hardly disputed on the part of the appellant) that the two other brothers continued joint after the separation of Shama Dass; and, further, that for many purposes Damodur Dass and the respondent (being his nephew, the son of Koonj Kishore Dass) were members of a joint family at the time of Damodur Dass' death."

Speaking, therefore for myself, as one of the Judges who decided the case of *Radha Churn Dass*, I am of opinion that the point has been definitively decided by their Lordships of the Privy Council, and had these judgments been brought to my notice, my judgment in the case of *Radha Churn Dass* would have been otherwise. The case must, therefore, be remanded to the lower Appellate Court to determine on the merits, whether the compromise can be set aside. We allow no costs in this Court.

Case remanded.

(1) 11 Moore's I. A., 369.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

SURJYA NARAIN SINGH (DEFENDANT) *v.* SIRDHARY LALL (PLAINTIFF).*

1883 *March* 9.

Hindu Law, Contract—Debtor and Creditor—Damdupat—Principal and interest—Interest in excess of principal.

Since the passing of Act XXVIII of 1855, a Hindu creditor may claim from his Hindu debtor interest in excess of the principal sum lent, should such interest have accrued.

The rule of law prohibiting the recovery of interest in excess of the principal sum lent was in force in the Mofussil of Bengal not as a provision of Hindu law, but as a statutory rule introduced by Regulation XV of 1793, and embracing all persons contracting in the Mofussil.

THIS was a suit to recover the sum of Rs. 58,800, the amount of two mortgage bonds which had been executed by the defendants in favour of the plaintiff on the 8th June 1872 and the 31st of March 1873, respectively. The principal due on the first bond was Rs. 1,000, and the interest Rs. 1,308. The principal due on the second bond was Rs. 19,000, and the interest due on this bond was Rs. 37,492. Two questions arose on this appeal: (1), whether compound interest was chargeable under the term of the bonds; (2), whether interest greater in amount than the principal could be recovered. The Court below decided both these points in favour of the plaintiff, following, on the second point, the case of *Deen Dyal Paramanick* v. *Kylash Chunder Pal Chowdhry* (1), in preference to *Ramoonnoy Audicary* v. *Johur Lall Dutt* (2). One of the defendants, a subsequent mortgagee, appealed, making the plaintiff alone the respondent.

The *Advocate-General* (Mr. *G. C. Paul*), Baboo *Mohesh Chunder Chowdhry* and Baboo *Taruck Nath Palit* for the appellant.

The Advocate-General.—The appellant is entitled to dispute the amount due on the plaintiff's mortgage—*Ram Chandra Mankeshwar* v. *Bhimrav Ravji* (3). The plaintiff cannot recover

* Appeal from Original Decree No. 103 of 1881, against the decree of Moulvi Hafiz Abdul Karim, First Subordinate Judge of Bhagulpore, dated the 11th February 1881.

(1) I. L. R., 1 Calc., 92; 24 W. R., 106.

(2) I. L. R., 5 Calc., 867.

(3) I. L. R., 1 Bom., 577.

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compound interest on his bond. At any rate he cannot recover more interest than the amount of his principal—*Ram Lal Mookerjee* v. *Haran Chandra Dhar* (1); *Mia Khan* v. *Bibi Bibijan* (2); *Omda Khanum* v. *Brojendro Coomar Roy Chowdhry* (3); *Ramconnoy Audicary* v. *Johur Lall Dutt* (4). This rule is a rule of Hindu law, Colebrooke, Bk. I, para 59; *Goverdhun Das* v. *Waris Ali* (5); and is still in force as it has not been abolished by legislative enactment, Act VI of 1871, s. 24.

Mr. *Evans* and Baboo *Doorga Mohun Das* for the respondent.

Mr. *Evans*.—The rule that interest was not to exceed the principal was a specific rule introduced by Regulation XV of 1793, and was rescinded by Act XXVIII of 1855—*Kalica Prosad Misser* v. *Gobind Chunder Sein* (6). It was not then introduced as a living custom of Hindu law, and, in fact, like other rules laid down by Menu, it has long been obsolete—*Ramalakshmi Ammal* v. *Sivanautha Perumal Sethurayar* (7); *Lulloobhoy Bappoobhoy* v. *Cassibai* (8). The Bombay Regulations were different—*Khushalchand Lalchand* v. *Ibrahim Fakir* (9). The Civil Courts' Act (VI of 1871) s. 24, does not apply. [The learned Counsel also referred to *Huromonee Gooptia* v. *Gobind Coomar Chowdhry* (10), and to *Madhub Chunder Poramanick* v. *Raj Goomar Doss* (11).]

The judgment of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

PRINSEP, J.—The questions raised in this appeal are, *first*, whether the bond marked "A," executed by Baboo Ram Gopal Singh to Baboo Sirdhary Lall, dated the 31st March 1873, entitles Baboo Sirdhary Lall to demand compound interest; and, *second*, whether under Hindu law plaintiff was entitled to recover arrears of interest to an amount greater than the principal. One portion of the bond runs as follows: "I, the declarant, * * * have borrowed from Baboo Sirdhary Lall, inhabitant and part proprietor

(1) 3 B. L. R., (O. C.), 130.
(2) 5 B. L. R., 500.
(3) 12 B. L. R., 451.
(4) I. L. R., 5 Calc., 867.
(5) 4 Sel. Rep., 261.
(6) Suth. S. C. C., 110: 2 W. R. S. C. C., 1.
(7) 14 Moore's I. A., 570: 12 B. L. R., 396.
(8) L. R., 7 I. A., 212: I. L. R., 5 Bom., 110.
(9) 3 Bom. H. C. R., (A. C.) 23.
(10) 5 W. R., 51.
(11) 14 B. L. R., 76.

of Maskin Masihuddinuggur, pergunnah Bhagulpore, Rs. 19,000, bearing interest at the rate of one rupee five annas per cent per mensem from this day up to the date of repayment. Therefore I, the declarant, do hereby declare and state in writing that I shall pay the interest on the said sum every year, and the principal in one lump sum in Magh 1286, F. S.; that whatever amount will be paid for interest or principal, I, the declarant, shall have the same credited on the back of this bond, the plea of payment, under a separate receipt, or in any other way, shall be invalid; that I shall pay off the interest for each year after adjustment; that out of the amount paid in a year, at first the interest found due on adjustment of the account for the year shall be deducted, and if there remains any surplus, it shall be set off against the principal; that I, the declarant, shall not claim any interest on the amount thus paid; that I shall pay interest at the said rate until payment on the entire sum found to be due after adjustment of the account for a year."

We think that the interpretation of this document is that the accounts are to be made up at the end of each successive year, and that whatever remains due is treated as principal, and bears interest at the stipulated rate of one rupee five annas per cent per mensem, and that the contention of the appellant, that the plaintiff cannot claim compound interest under the bond, is untenable.

In regard to the second question it is necessary, in order to come to a correct conclusion, to enter into some details in respect of the law relating to usury in Lower Bengal. By Regulation XV of 1793, s. 6, it was declared that if the interest on any debt, calculating according to the rates allowed by the Regulation, should accumulate so as to exceed the principal, the Courts were not, except in certain specified cases, to decree a greater sum for interest than the amount of such principal. This was not declared to be a principle of Hindu law, applicable only to Hindus, but was a statutory provision embracing all persons contracting in the Mofussil. Nevertheless, it was the practice of the Courts to allow interest in excess of the principal where the interest had accumulated owing to reasons not ascribable in any degree to the laches of the creditor. In the case of *Jankee*

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Pershad v. *Maharajah Oodwunt Narain Singh* (1), it was decided that interest exceeding the principal could, in the case of Hindus, be granted if eht excess accrued *pendente lite*, and there is no fault attributable to the creditor. No custom or usage among Hindoos was asserted in that case. Subsequently in the case of *Goverdhun Dass* v. *Waris Ali* (2), interest exceeding the principal was granted. This was the state of the law and practice of the Courts until the supersession of Regulation XV of 1793 by Act XXVIII of 1855. By s. 2 of that Act it was declared that in any suit in which interest was recoverable the amount should be adjudged or decreed by the Court at the rate, if any, agreed upon by the parties, and if no rate should be agreed upon, at such rate as the Court should deem reasonable. Subsequent to the passing of this Act, in the case of *Kalica Prosad Misser* v. *Gobind Chunder Sein* (3), it was decided that the law under which the claim for accumulated interest was limited in amount to a sum not exceeding the principal had been rescinded by Act XXVIII of 1855. This was a case between Hindus. This decision was followed in the case of *Huromonee Gooptia* v. *Gobind Goomar Chowdhry* (4), and in the case of *Cmda Khanum* v. *Brojendro Coomar Roy Chowdhry* (5). It would thus appear that from the earliest times up to the year 1874 no claim for a reduction of interest has ever been allowed on the ground of Hindu law or usage, but on the contrary that this contention whenever raised has always been repudiated, and in several cases the Courts granted interest beyond the principal. In this respect the Courts in the province of Lower Bengal have been in no way singular. The very same point has been decided in conformity with this view in the North-Western Provinces to which the Bengal Regulations apply, and in Madras where the Regulation is of similar import.

In the case of *Annaji Rau* v. *Ragubai* alias *Sithabai* (6) the Court at Madras declared that in the matter of interest the Hindu law was not binding in the Mofussil. This

(1) 3 Sel Rep., 270.
(2) 4 Sel Rep., 261.
(3) Suth S C C, 110: 2 W R S C C, 1.
(4) 5 W. R., 51.
(5) 12 B. L. R, 451.
(6) 6 Mad. H. C., 400.

decision was followed in the case of *Kuar Lachman Singh* v. *Pirbhu Lall* (1). So that there is a complete consensus of opinion in Bengal, in the N. W. P., and in Madras, that since the passing of Act XXVIII of 1855, a Hindu may claim from another Hindu interest in excess of the principal. We do not refer to the cases decided in the Bombay Presidency, because, as appears from the case *of Khusalchand Lalchand* v. *Ibrahim Fakir* (2) the Regulations in that Presidency were different from those in Bengal and Madras. The learned Advocate-General, in support of his view that interest should not be allowed beyond the principal, has referred to the decision of Sir Barnes Peacock in the case of *Ram Lall Mookerjee* v. *Haran Chandra Dhar* (3), in which it was decided that within the town of Calcutta, interest as between Hindus, might not exceed the principal.

This decision, though doubted in the case of *Meah Khan* v. *Bibi Bibijan* (4) has been followed in a case lately decided in the Original Side of this Court, but this judgment is founded upon considerations special to the town of Calcutta, and has no application to the Mofussil.

We are, therefore, of opinion that there is a whole series of cases from the earliest times to show that in Bengal interest beyond the principal is demandable among Hindus, and the contention now raised by the learned Advocate-General cannot be sustained.

In this view, we dismiss the appeal with costs.

Appeal dismissed.

(1) 6 N. W. P. H. C., 358.
(2) 3 Bom. H. C. A. C., 23.
(3) 3 B. L. R., O. C., 190.
(4) 5 B. L. R., 500.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

1883 *March 9.*

RAM NARAIN SING (JUDGMENT-DEBTOR) *v.* PEARAY BHUGUT (DECREE-HOLDER.)*

Hindu Law—Husband and Wife—Immovable Property—Gift—Deed of Gift.

It is not necessary in Hindu law, in order that a wife should take an absolute estate in immovable property under a deed of gift from her husband, that the gift should be made with such words of limitation as are ordinarily used to convey an estate of inheritance. The intention of the husband may be expressed in other ways, and is a matter of construction merely.

Koonj Behary Dhur v. *Prem Chand Dutt* (1), distinguished.

THE facts of the case and the arguments are sufficiently set out in the judgment.

Baboo *Mohesh Chunder Chowdhry* for the appellant.

Baboo *Chunder Madhub Ghose* for the respondent.

The judgment of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

PRINSEP, J.—This case depends upon the proper construction of a deed of grant from a husband to his wife. The document sets forth that it conveys all his rights to the lady without exception; that she shall take possession of his property; that neither he nor his heirs shall at any time have any claim either to the property or to the price or value of it.

It has been contended on behalf of the appellant, first, that, unless there are express terms in the grant, such as will convey ordinarily an estate of inheritance, the gift must be taken to be only one lasting for the lifetime of the lady. In support of the contention we have been referred to the case of *Koonj Behary Dhur* v. *Prem Chand Dutt* (1), and, no doubt, if one sentence of that judgment be taken by itself, it would support the contention now raised

* Appeal from Appellate Order Nos. 272, 273, and 274 of 1882, against the order of W. Verner, Esq., Judge of Bhagulpore, dated the 8th June 1882, modifying the order of Moulvi Syed Fukruddin Hossen, Munsiff of Jamooyee, dated the 3rd June 1881 and 6th May 1882.

(1) I. L. R., 5 Calc., 684; 5 C. L. R., 561.

before us. But when we look at the case as a whole, we find that the learned Judges who expressed that opinion were not content to base their judgment on it, but actually decided upon the terms of the grant. There is also another case of *Srimati Pabitra Dasi* v. *Damudar Jana* (1), which does not coincide with the expression of opinion in the case to which we have already referred. It seems to us that that statement made by the learned Judges is not binding upon us as a judicial decision, and is inconsistent with the case referred to of *Srimati Pabitra Dasi* v. *Damudar Jana* (1).

We are, therefore, of opinion that this should be decided upon the terms of the grant. Looking at the fact that the husband divested himself of all his rights that he prohibited his descendants from claiming the property or its price, we think that the gift was a gift out and out.

In this view we dismiss the appeals with costs.

Appeals dismissed.

Before Mr. Justice McDonell and Mr. Justice Tottenham.

TARRUCK CHUNDER BHUTTACHARJEE AND OTHERS (JUDGMENT-DEBTORS) *v.* DIVENDRO NATH SANYAL AND OTHERS (DECREE-HOLDERS).*

1883 *April* 5.

Execution—Joint Decree—Payment Out of court to one of several joint judgment-creditors—Part satisfaction certified to the Court—Application for execution of full amount of decree—Civil Procedure Code (Act XIV of 1882), *ss.* 244, 258.

On an application for execution for the full amount due under a decree by some of several joint decree-holders, the judgment-debtor objected to execution being granted for the full amount of the decree on the ground that he had already paid off a large portion of the money due under the decree to *B*, one of the joint decree-holders. The payment was made out of Court, but *B*, who claimed to be entitled to a 12½ annas share in the decree, certified the payment in the manner prescribed by s 258 of the Civil Procedure Code (Act XIV of 1882), and represented that his claim had been satisfied in full. The other joint decree-holders denied *B's* right to the 12½ annas share claimed by him, and refused to recognise the

* Appeal from Original Order No. 50 of 1883, against the order of J. G. Charles, Esq., Officiating Judge of Rajshahye, dated the 30th January 1883.

(1) 7 I. L. R., 697.

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payment said to have been made to him. The lower Court disallowed the objection, and granted execution for the full amount of the decree.

Held that, regard being had to the provisions of the General Clauses Act (Act I of 1868) the word "decree-holder" in s. 258 of Act XIV of 1882 should be read in the plural, and looking at the provisions of s. 231 of the latter Act, the Court ought not to recognise payments made out of Court, unless made and certified *for the benefit* of all the joint decree-holders of any portion of the decree in excess of that to which the decree-holder so paid is undisputedly entitled.

Held, also, that a judgment-debtor is entitled to credit for any sum paid *bonâ fide* to one of several joint decree-holders, and duly certified to the Court by the latter, and that the other joint decree-holders cannot execute the decree for more than their own share.

Held, further, that in this case the lower Court was wrong in wholly ignoring the payment certified by the decree-holder *B*, and that it should have determined, *first*, whether the payment to *B* was a fraud on the other joint decree-holders; and, *secondly*, what amount the latter were entitled to have out of the whole decree, the latter being the main question between the applicants for execution and the judgment-debtor, and as such clearly within the scope of s. 244 of the Civil Procedure Code.

Ranee Nyna Kooer v. *Doolee Chund* (1); *Brojeswari Chowdhranee* v. *Tripoora Soonderee Debi* (2); and *Mahima Chandra Roy* v. *Pyari Mohan Chowdhry* (3).

THIS was an appeal against the order of the Officiating Judge of Rajshahye disallowing the objections of a judgment-debtor in an execution case. The facts appear sufficiently for the purpose of this report in the judgment of Mr. Justice Tottenham.

The *Advocate-General* (Mr. *G. C. Paul*) (with him Baboo *Rash Behary Ghose* and Baboo *Aukhil Chunder Sen*) for the appellant.

The lower Court is wrong in holding that a certificate is of no effect, unless made by all the decree-holders in a case where there may be more than one decree-holder. Payment to one of several joint-creditors is in law a payment to all, and consequently the payment here to the decree-holder is a payment to all persons having a joint interest with him in the decree. Here the Court below was wrong in granting execution for the full amount of the decree, as one of the decree-holders,

(1) 22 W. R., 77. (2) 3 C. L. R., 513.
(3) 2 B. L R., Ap., 43.

viz., Behary Lall, at any rate admitted that his claim had been satisfied. The Court below also should have determined the amount of the share Behary Lall had in the decree, when it was disputed by the other decree-holders, as the judgment-debtor was at any rate entitled to claim that his portion of the decree had been satisfied—*Ranee Nyna Kooer* v. *Doolee Chund* (1); *Brojeswari Chowdhranee* v. *Tripoora Soonderee Debi* (2); *Ahamudeen* v. *Grish Chunder Shamunt* (3); and Chitty on Contracts, 716.

Baboo *Rash Behary Ghose* followed, and in support of the above contentions cited *Wise* v. *Moulvie Abdool Ali* (4); *Umrith Nath Chowdhry* v. *Chunder Kishore Singh* (5); *Shib Chunder Dass* v. *Ram Chunder Poddar* (6); *Kally Soondery Dabia* v. *Hurrish Chunder Chowdhry* (7); and *Ahamudeen* v. *Grish Chunder Shamunt* (3).

Baboo *Gopal Lal Mitter* (with him Baboo *Saroda Churn Mitter*) for the respondent.

The other decree-holders are in no way bound by the payment out of Court to Behary Lall. In *Mahima Chandra Roy* v. *Pyari Mohan Chowdhry* (8), it has been held that, although the decree had been fully satisfied by payment of the whole amount of the decree to one of two decree-holders, the other was still entitled to re-open the proceedings, and take out execution for his moiety.

The judgments of the Court (McDONELL and TOTTENHAM, JJ.) were as follows :—

TOTTENHAM, J.—The cause of this appeal, which arises from the execution of a decree, is the refusal of the lower Court to recognize an alleged payment out of Court by the judgment-debtors of a large portion of the amount of the decree to one

(1) 22 W. R., 77.
(2) 3 C. L. R., 513.
(3) I. L. R., 4 Calc., 350.
(4) 7 W. R., 136.
(5) 21 W. R., 31.
(6) 16 W. R., 29.
(7) I. L. R., 6 Calc., 594: S. C. on appeal, L. R. 10 I. A., 4: S. C. *ante*, p. 482.
(8) 2 B. L. R., Ap., 43.

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amongst several joint decree-holders, who also had certified the payment in the manner prescribed in s. 258 of the Civil Procedure Code. This individual did not profess to have received payment for the joint benefit of all the decree-holders; but claiming to be entitled to 12½ annas share of the whole, represented that his claim had been satisfied.

Application was made by the other decree-holders for execution of the whole decree. They denied the right of Behary Lall to 12½ annas share, or to any more than a small fraction of the decretal amount, and refused to recognize the payment said to have been made to him.

The lower Court was of opinion that a payment out of Court could not be recognized under s. 258 unless certified by all the decree-holders; and that a sharer in a joint decree could not be allowed to realize for himself separately. He, therefore, overruled the debtor's objection, and holding that it was unnecessary to decide to what extent the decree-holders were severally interested, he ordered the execution to proceed as for the whole amount. It has been argued before us for the appellants that the lower Court was wrong in holding that a certificate under s. 256 is of no effect, unless made by all the decree-holders in a case where there are several; that payment to one of several joint-creditors is in law payment to them all; and that at any rate the Court below ought not, on the present application, to have allowed the applicants to take out execution for more than their own share of the decree since Behary Lall admitted having received his share. In connection with this last point there has been some discussion, whether under s. 244 of the Code the amount of the respective shares of the several decree-holders is a question between the parties to the suit, *i.e.*, plaintiffs and defendants, or is one between the plaintiffs themselves; and, if the latter, whether the Court can decide it in the execution proceedings.

To show that it is not essential that all the decree-holders must unite in certifying under s. 258 a payment made out of Court, the learned Advocate-General cited *Ranee Nyna Kooer* v. *Doolee Chund* (1), and *Brojeswari Chowdhranee* v. *Tripoora Soonderee*

(1) 22 W. R., 77.

Debi (1). Certainly in these cases the Court did take into consideration the fact that payment had been certified under s. 206 of Act VIII of 1859 by one decree-holder.

In each of these cases one of the decree-holders had certified payment of the whole decree. In the first case this Court held that, under the circumstances, the remaining decree-holders ought not to be allowed to take out execution again, until they had satisfied the Court that they knew nothing of the payment; that if made it was a fraud upon them; and that the judgment-debtor was privy to the fraud.

In the second case also full payment had been certified; but on enquiry the Court disbelieved the fact of any payment at all: yet held that, inasmuch as the party certifying it was admittedly entitled to one moiety, the other decree-holder could not be allowed to execute the decree for more than the other moiety.

In both cases the Court recognized the validity of payments certified by one only of joint decree-holders. And whatever be the correct technical construction of s. 258, *i.e.*, whether "*the decree-holder*" may be construed "as *any one amongst any number of decree-holders*," it seems impossible to say that, so far as the undisputed share of the one who certifies is concerned, the Court would be wrong in giving credit to the judgment-debtor.

But I must say that I am disposed to think that, regard being had to the provisions of the General Clauses Act, (which governs the present Code, though it did not touch Act VIII of 1859) the words "the decree-holder" in s. 258 should be read in the plural in cases in which there are more decree-holders than one; and that, strictly, the Court ought not to recognize payments made out of Court, unless made and certified *for the benefit of all*, at least in cases where, as in this one, the extent of the shares is in dispute. I am rather strengthened in this view by the terms of s. 231.

That section provides that any one or more of joint decree-holders may apply for execution of the whole decree *for the benefit of all*. The Court may grant such application if it sees sufficient cause for doing so; but it must then pass some order

(1) 3 C. L. R., 513.

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for protecting the interests of the persons who have not joined in the application. Whereas then by this section the Court is not permitted to allow one of several joint decree-holders to obtain execution of the whole decree for his own individual benefit, it seems unlikely that it was intended that, under s. 258, the same Court should recognize the payment out of Court to one of several joint decree-holders for his own benefit, and not for the benefit of all, of any portion of the decree in excess of that to which he is undisputedly entitled. In the case cited above, *Brojeswari Chowdhranee* v. *Tripoora Soonderee Debi* (1), this principle seems to have been adopted; for credit was given only for the amount of the acknowledged share of the decree-holder who had admitted having received the whole amount of the decree. And in another case, *Mahima Chandra Roy* v. *Pyari Mohan Chowdhry* (2), it was held that, although the decree had been fully satisfied by payment of the whole amount to one of two decree-holders, the other one was still entitled to re-open the proceedings, and take out execution for a moiety of the amount of the decree.

But in the case of *Ranee Nyna Kooer* v. *Doolee Chund* (3), payment of the whole decree having been certified by one, the principal decree-holder, this Court would not suffer the other decree-holders to execute the entire decree.

The decided cases, therefore, do seem to establish this, that a judgment-debtor is entitled to credit for any sum paid *bonâ fide* to one of several joint decree-holders, and duly certified to the Court by the latter; and that the other joint-creditor cannot execute the decree for more than their own share.

This being so, I would hold in the present case that the lower Court was wrong in wholly ignoring the payment certified by the decree-holder Behary Lall. Whether the debtors are entitled to have credit for the whole of the sum certified, or for only a portion of it, will depend upon other considerations. It will depend partly upon the question whether payment to one joint decree-holder is good as against all; and partly on the question whether the Court in the execution proceedings can determine

(1) 3 C. L. R., 513. (2) 2 B. L. R., Ap., 43 (3) 22 W. R., 77.

the shares of the joint decree-holders severally. As to the first question the Advocate-General's position is that in law the release of a debt by one of several joint-creditors is a release by all: and the case of *Ranee Nyna Kooer* v. *Doolee Chund* (1) seems to affirm this principle in the absence of fraud. But the case of *Mahima Chandra Roy* v. *Pyari Mohan Chowdhry* (2), directly ignores the principle; while the case of *Brojeswari Chowdhranee* v. *Tripoora Soonderee Debi* (3), neither affirms nor contradicts it; for it was held that no payment had been made at all. Apparently then the lower Court could not properly dispose of the judgment-debtor's objection in this case, and order execution in favour of the decree-holders who applied for it, without deciding, first, whether the payment to Behary Lall was a fraud upon them committed by the judgment-debtors, and next what amount they were entitled to have out of the whole decree. This last question is, no doubt, one that is between Behary Lall and the other decree-holders; and as such may not be one which the Court should decide in the execution proceedings. But it is not necessary to decide whether the Court has jurisdiction to decide the point as between the decree-holders; for it is obviously also a question, and the main question, between the applicants for execution and the judgment-debtors: and as such it clearly comes within the scope of s. 244.

Shortly stated the question is for what amount are the applicants entitled to have execution? And this question it is necessary for the Court executing the decree to determine under s. 244; it being clear that Behary Lall's share at least has been paid off.

I would, therefore, allow this appeal; and, setting aside the lower Court's order, would send the case back to have the question determined.

MCDONELL, J.—I concur in the order of remand and for the reasons given by my learned colleague. The appellant will be entitled to five gold mohurs as costs of this appeal.

Appeal allowed and case remanded.

(1) 22 W. R., 77. (2) 2 B. L. R., Ap., 43. (3) 3 C. L. R., 513.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

1883
March 28.

ATRI BAI (CLAIMANT) *v.* ARNOPOORNA BAI (OBJECTOR).*

Land Acquisition Act (X of 1870, ss. 15, 39)—Appeal—Second Appeal—High Court, Appeal to.

Where a dispute as to the right of one of two claimants to certain compensation awarded under the provisions of the Land Acquisition Act has been referred to the Civil Court under s. 15 of that Act, a second appeal will lie to the High Court from the judgment passed in an appeal against the decision of the Court to which the dispute was referred.

IN this case an award of Rs. 69 was made by the Land Registration Officer at Cuttack, in respect of compensation for a share in a piece of land occupied by the compound and building of the Office of the Commissioner of that district. Two claimants for the money, Atri Bai and Arnopoorna Bai, having appeared before the Collector, the latter referred the matter to the Munsiff of Cuttack under s. 15 of the Land Acquisition Act X of 1870. The Munsiff decided in favour of Atri Bai, but this decision was reversed by the District Judge on appeal. Atri Bai appealed to the High Court, where a preliminary objection was taken that no appeal lay.

Baboo *Gopi Nath Mookerjee* and Baboo *Aubinash Chunder Banerjee* for the appellant.

Baboo *Mohit Chunder Bose* and Baboo *Boido Nath Dutt* for the respondent.

The judgment of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

PRINSEP, J.—A preliminary objection has been raised to the hearing of this appeal that the law (s. 39 of the Land Acquisition Act of 1870) does not provide for a second appeal; and that only certain provisions of the Code of Civil Procedure, among which the chapter relating to appeals is not to be found, are extended to proceedings under that Act. The case falls

*Appeal from Appellate Order No. 386 of 1882, against the order of J. B. Worgan, Esq., Officiating Judge of Cuttack, dated the 2nd September 1882, reversing the order of Baboo Nilmadhub Shamanta, First Munsiff of that District, dated the 31st March 1882.

under Part IV of the Land Acquisition Act, and relates to the apportionment of the compensation awarded. The limitation of the application of the Code applies only to Part VII. Further it appears to us from the very nature of the dispute between the parties that these proceedings must be regarded as a suit. In the next place s. 39 declares that in cases like the present case "the appeal shall lie in the *first instance* to the District Judge," from which it would seem that a further appeal was contemplated by the Legislature. In any case, however, having regard to the nature of the proceedings and the powers conferred on us by law in suits, we should not be inclined to limit our jurisdiction without any express words in any law to that effect.

On the merits of the case there is no reason to question the correctness of the conclusion arrived at by the lower Appellate Court.

The appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Prinsep and Mr Justice O'Kinealy.

KOOB LALL CHOWDHRY (DEFENDANT) *v.* NITTYANUND SINGH AND OTHERS (PLAINTIFFS).*

1883
April 5.

Execution of decree—Mortgage Decree—Decree on mortgage bond—Sale of Decree—Conveyance—Registration.

A decree-holder purported to sell to *A*, by private sale, all his right, title, and interest in a mortgage decree obtained by him in a suit on a mortgage bond against the mortgagor. The deed of sale was not registered. Afterwards, by a registered deed of sale, *A* conveyed all his right, title, and interest in the same decree to *B*.

Held, that the right to execute the decree as a mortgage-decree did not pass to *B*.

THE facts of this case were as follows: On the 5th of January 1877, one Golab Chand Nowlakha obtained the usual mortgage decree on a mortgage bond against one Shaikh Imdad Ali. By a deed of sale, dated the 6th of August 1877, this decree was sold

*Appeal from Appellate Decree No. 971 of 1882, against the decree of F. Comley, Esq., Judge of Purnea, dated the 27th March 1882, affirming the decree of S. Wright, Esq., Sub-Judge of that district, dated the 18th November 1881.

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by the decree-holder to one Shaikh Jotee: this deed of sale was not registered. On the 15th of July 1879, by a registered deed of sale, Shaikh Jotee sold the decree to one Koob Lall Chowdhry. In the meantime, on the 5th of November 1878, one Srinundun Singh, in execution of a money-decree passed in his favor against Imdad Ali on the 12th of August 1878, purchased and entered into possession of the property covered by the mortgage decree. On the 17th of August 1880, Koob Lall Chowdhry attached the mortgaged property in execution of the mortgage decree. Srinundun Singh applied for the release of the property from attachment, but this application was dismissed on the 18th of December 1880; and on the 7th of March 1881, Srinundun was compelled to deposit Rs. 1,057-1-8 in order to save the property from sale. The plaint in the present suit was filed on the 20th of June 1881, and prayed for a decree setting aside the order of the 18th of December 1880, and for the recovery of the amount of the deposit with interest and costs.

The Subordinate Judge decreed the plaintiff's claim, citing *Gopal Narayan* v. *Trimbak Sadashiv* (1). On appeal the Judge said:—

"The Subordinate Judge finds that the transfer of the decree by Golab Chand Nowlakha to Jotee was in consequence of the non-registration of the conveyance deed, a transfer, in effect, of the decree, as a decree for money alone; and that under such a transfer Jotee lost the right of lien against immovable property declared by the decree. On that point the Subordinate Judge's decision appears to be correct, if the transfer rested solely on that conveyance, for under s. 17, Act III of 1877, that conveyance ought to have been registered. It appears that Golab Chand took out execution of his decree, and had the property in dispute notified for sale to take place on the 6th of August 1877; that on that date Golab Chand sold his right under the decree to Jotee, and applied to the Munsiff to stay the sale, to strike off the name of the applicant (Golab Chand), decree-holder, and to insert in lieu the name of the purchaser Shaik Jotee. The order made by the Munsiff was: 'In accordance with the petition of the decree-holder, let the sale be stopped, and let this case be struck off the file.' This is not equivalent to an order admitting Jotee to be the assignee representative in the decree proceedings of Golab Chand, and does not bring the case within the exemption clause (i) s. 17, Act III of 1877."

(1) I. L. R., 1 Bom., 267.

The District Judge dismissed the appeal with costs. The defendant appealed to the High Court on several grounds to the effect that no registration of the deed of the 6th of August 1877 was necessary; that Jotee had been placed on the record as decree-holder, and his subsequent registered conveyance passed a good title to the decree; and that the case came within clause (i), s. 17, Act III of 1877.

Mr. *C. Gregory* for the appellant.

Munshi *Mahomed Yusuf* for the respondents.

The judgment of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

PRINSEP, J.—We think that the orders passed by the lower Courts are correct. Golab Chand Nowlakha, defendant No. 5, in 1877, obtained a mortgage decree against Imdad Ali. The plaintiff, in execution of a decree held by another person, has purchased the property hypothecated by that decree. The defendant, Koob Lall, stating that he was the assignee of the decree-holder, then executed the mortgage-decree obtained by Golab Chand and was about to put up for sale a portion of the property previously purchased by the plaintiff, when the plaintiff, in order to protect that property from sale, deposited under protest the money due under the decree. The present suit is to recover the money so paid. It has been found by both the lower Courts that Golab Chand, on the 6th August 1877, sold to one Jotee under an unregistered deed of conveyance, and that Jotee in August 1880 transferred his rights thereunder to Koob Lall by a registered conveyance. Both the Courts have found, and we think rightly, that the title under which Jotee acquired the rights of Golab Chand not being registered, and the registration law requiring that such conveyances should be registered, the title of Koob Lall from Jotee, so far as it relates to the mortgage lien on this property, is defective, inasmuch as it cannot be proved to come from Golab.

We think that the rule recently laid down by a Full Bench of this Court as regards the right of an obligee to recover on an unregistered mortgage bond, should be applied to cases such as that now before us, and that accordingly Koob Lall must be

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held to have acquired only a money decree entitling him to recover the amount of the decree without any hypothecation of any particular property.

Under such circumstances plaintiff, as purchaser of the property held by Imdad Ali, is entitled to recover the money paid to stay the resale of this property in execution of the decree held by Koob Lall since the rights of the debtor have passed to him, and Koob Lall can enforce no lien on it.

We dismiss the appeal with costs. *Appeal dismissed.*

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

1883 *March* 16.

TARA PRASAD MYTEE AND ANOTHER (DEFENDANTS) *v.* NUND KISHORE GIRI AND OTHERS (PLAINTIFFS).*

Execution of Decree—Sale of immovable property—Confirmation of sale—Sale certificate—Evidence.

The order confirming a sale of immovable property in execution of a decree is sufficient to pass the title in the property to the purchaser, and its production is sufficient evidence of the purchaser's title. The production of the sale certificate is not essential.

Doorga Narain Sen v. *Baney Madhub Mozoomdar* (1) followed.

IN this case the judgment appealed from was as follows :—

"The plaintiffs have brought this suit to recover possession of the property in dispute on the establishment of title as auction-purchasers at a sale in execution of a Civil Court's decree. It appears that the defendants have purchased the same property in execution of a decree for a share of the rent. The plaintiffs' purchase is prior to that of the defendants'. I think the sale *furd* and the proceedings confirming the sale in the name of the plaintiffs should be received as evidence in the case. The evidence and the circumstances of the case lead me to believe that the property in dispute is covered by the plaintiffs' auction-purchase, and the plaintiffs were in possession of the disputed property, and they paid rents. The receipts filed in the case substantiate their allegation. The appeal will be dismissed."

* Appeal from Appellate Decree No. 444 of 1882, against the decree of Baboo Kedar Nath Mozoomdar, Sub-Judge of Midnapore, dated the 31st December 1881, affirming the decree of Baboo Jodigeswar Gupto, Officiating Munsiff of Nemal, dated 24th March 1881.

(1) I. L. R., 7 Calc., 199.

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The defendants appealed to the High Court.

Baboo *Omesh Chunder Banerjee* for the appellants.

Baboo *Bhowany Churn Dutt* for the respondents.

The judgment of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

PRINSEP, J.—The main objection taken before us in this case is that the plaintiffs' suit should be dismissed, because they have failed to produce the sale certificate on which they acquired their title. It has nowhere been denied, nor is it disputed before us, that the plaintiffs purchased in an execution sale the right, title and interest of the defendants, judgment-debtors, in the present case. We, therefore, think that this objection is untenable, and in this respect we agree with the judgment of a Division Bench of this Court in the case of *Doorga Narain Sen* v. *Baney Madhub Mozoomdar* (1), in which it was held that "the order affirming the sale would be sufficient to pass a title to the purchaser; and the certificate which might afterwards be obtained by him would be merely evidence that the property so passed."

We therefore dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Cunningham and Mr. Justice Maclean.

KALI KRISHNA TAGORE (PLAINTIFF) *v.* FUZLE ALI CHOWDHRY AND OTHERS (DEFENDANTS).*

1883. *April* 10.

Landlord and Tenant—Forfeiture—Waiver by acceptance of Rent.

A lease provided that every four years a measurement should be made either by the lessor or by the lessees, and additional rent paid for accretion to the land leased It then provided for failure on the lessee's part to execute a kabuliat for the excess lands in the following terms: "If at the fixed time stated above we do not take an amin and cause measurement to be made you will appoint an amin and cause the entire land of the said chur to be measured, and no objection on the ground of our recording or not, our presence on such measurement chitta shall be entertained, and we will duly file a separate dowl kabuliat for the excess rent that will be found

* Appeal from Original Decree No. 228 of 1881, against the decree of Baboo Raj Chundra Sanyal, Officiating Second Sub-Judge of Backergunge, dated the 10th June 1881.

(1) I. L. R., 7 Calc., 120.

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after deducting the settled land of the dowl executed by us from the land settled therein. If we do not, we will be deprived of our right of obtaining a settlement of such excess land, as well as of the land which will accrete in future to the said chur, and no objection thereto on our part shall be entertained." In a suit by the lessor, alleging that in 1876 he had caused a measurement to be made, and had called on the lessees to execute a kabuliat for the rent of certain excess lands, and praying that the lessees might be ejected, the lessees pleaded that the lessor had waived his right to enforce the forfeiture by subsequent receipt of rent. It appeared that payments had been made to the lessor by the lessees, which were accepted as rent, but were kept in suspense, subject to payment by the lessees of the "remaining amount."

Held, that such a qualification did not make the payments anything else than payments of rent, and that the lessor had waived his right to insist on re-entry on the lessees' failure to measure the lands, or execute a kabuliat when called on to do so.

Davenport v. *The Queen* (1), followed.

Baboo *Kali Mohun Doss*, Baboo *Doorga Mohun Doss*, and Baboo *Ram Sakkhya Ghose* for the appellant.

Baboo *Rashbehary Ghose* for the respondents.

The facts of this case sufficiently appear from the judgment of the Court (CUNNINGHAM and MACLEAN, JJ.) which was delivered by

CUNNINGHAM, J.—In the suit out of which these appeals arise it is admitted that the plaintiff's father leased to the defendants on 30th Cheyt 1265 (12th April 1859) 4 deores 10½ kanis of culturable land at an annual rent of Rs. 335-4.

The lease provided that every fourth year a measurement should be made, either by the lessor or by the lessees, and additional rent paid for accretions to the land leased in 1859. It then provided for failure on the lessees' part to execute a kabuliat for the excess lands in the following terms:—

"If at the fixed time stated above, we do not take an amin and cause measurement to be made, you will appoint an amin and cause the entire land of the said chur to be measured, and no objection on the ground of our recording or not our presence on such measurement chitta shall be entertained, and we will duly file a separate dowl kabuliat for the excess land that will be found

(1) L. R., 3 App Cas., 115.

after deducting the settled land of the dowl executed by us from the land stated therein. If we do not, we will be deprived of our right of obtaining a settlement of such excess land as well as of the land which will accrete in future to the said chur; and no objection thereto on our part shall be entertained."

It is alleged in this suit that the plaintiff caused a measurement to be made in 1282 (1875-76) which resulted in a notice dated 31st December 1876, calling on defendants to execute a kabuliat for rent of 9 deores 10 kanis 6½ gundas of excess lands, and the plaintiffs called on the Court to enforce the forfeiture entailed by defendant's failure to execute the kabuliat by ejecting the defendants, or assessing rent on the excess lands.

The defendants denied the fact of measurement, and notice to execute a kabuliat, and in the 9th paragraph of their written statement pleaded that plaintiff had waived his right to enforce the forfeiture by subsequent receipt of rent.

The lower Court has found that the plaintiff measured the land and gave notice to the defendants as alleged, and that there was an excess by accretion of 8 deores 12 kanis and 3 gundas of land. It also found that plaintiff had not waived the right to enforce the forfeiture by subsequent receipt of rent.

But the lower Court, considering that the plaintiff having claimed relief in an alternative form, had really left it to the Court to do substantial equity, decided that the plaintiff should take the rent which it assessed, and should not get possession.

Both sides appeal—plaintiffs in suit No. 228 urging that they are entitled to possession, and that they have not forfeited or waived their right; the defendants in No. 243 questioned the findings of the lower Court, and urged that the decree assessing rent was bad.

Vakils were heard on both sides, and in the end they left it to the Court to decide whether the plaintiffs were entitled to insist on khas possession. The plaintiff's vakil referred the Court to a decision of another Bench in appeal from original decree No. 276 of 1871. That was a case between the plaintiff and other parties. It was founded upon a kabuliat identical in terms as to measurement and forfeiture with the kabuliat in this

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case, and we find that in that case the prayer was for khas possession only, and there was no plea of waiver by receipt of rent. We do not think, therefore, that we are in any way bound to consider that decision, which is under appeal to Her Majesty in Council.

After careful consideration of the case we think that we ought to affirm the decision of the lower Court, and dismiss the plaintiff's appeal on the ground that by receipt of rent in the years 1275, 1276, 1277, 1281, 1282, 1283, 1284, and 1286, for excess lands the plaintiff waived his right to insist on re-entry on defendants' failure to measure the lands, or execute a kabuliat when called on to do so in Pous 1283.

It appears that in each of these years the defendants made an undisputed payment of Rs. 150, which was accepted as rent, but was kept in suspense subject to payment by the defendants of the "remaining amounts." We are decidedly of opinion that such a qualification did not make these payments anything else than payments of rent, and we think that we may be guided on the effect of these payments by the opinion of the Judical Committee in *Davenport* v. *The Queen* (1), to which the defendants' vakil referred us. Their Lordships there remark at pages 131-132: "Where money is paid and received as rent under a lease, a mere protest that it is accepted conditionally and without prejudice to a right to a prior forfeiture cannot countervail the fact of such receipt." In the present case the plaintiff received rent after the defendants had incurred a forfeiture—not indeed conditionally and without prejudice to the forfeiture, but unconditionally and without prejudice to his claim to a larger amount.

The defendants' vakil did not press us with Appeal No. 243. We, therefore, dismiss both these appeals, and under the circumstances direct that both sides bear their own costs in this Court.

Appeals dismissed.

(1) L. R. 3 App. Cas., 115.

APPELLATE CRIMINAL.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

EMPRESS *v.* ISHAN CHUNDRA DE AND ANOTHER.*

1883
May 2.

Bengal Excise Act (VII of 1878), ss. 15, 53, 60, 61—Sale by servant of licensed vendor—Cooly employed by servant—Reference to High Court—Revisional Jurisdiction.

The servant of a licensed vendor sold eight quart bottles of country spirit, and employed a cooly to carry them as he directed. The servant was convicted under s. 60, Beng. Act VII of 1878; and the cooly was convicted under s. 61 of the same Act. It was suggested that the servant should have been convicted under s. 53, and that the cooly had committed no offence.

Held, that the conviction of the cooly was illegal, and must be set aside.

Held, also, that the servant was properly convicted, and whether under s. 60 or s. 53 was immaterial.

Queen v. *Ishan Chunder Shaha* (1); and *Empress* v. *Baney Madhub Shaw* (2) followed.

The necessity for altering a conviction from one section to another for cognate offences, when the accused has not been prejudiced by any such error, is no sufficient ground for a reference to the Court of Revision.

THIS was a reference from the Sessions Judge of Tipperah under s. 438 of the Code of Criminal Procedure. The terms of the Reference were as follows:—

Accused No. 1 has been convicted under s. 60, and accused No. 2 under s. 61 of Beng. Act VII of 1878. The former sold eight quart bottles of country spirit, and the latter had them in his possession, i.e., carried them as a cooly by direction of accused No. 1.

It is contended that the conviction of both the accused is illegal, because accused No. 1 was not a licensed vendor, and accused No. 2 might lawfully have had 12 quart bottles in his possession.

With regard to the case of accused No. 1 he is not a licensed vendor, but he is servant to a licensed retail vendor, and sold the liquor as such. Section 60 applies only to sale by licensed vendors, accused ought not therefore to have been convicted under that section. It may be that he has committed an offence punishable under s. 53, and if an appeal lay to this Court, I might perhaps under s. 423 of the Criminal Procedure alter the finding

* Criminal Reference No. 49 of 1883, from the order made by R. Towers, Esq., Sessions Judge of Tipperah, dated the 25th April 1883.

(1) 19 W. R., Cr., 34.

(2) I. L. R., 8 Calc., 207: 10 C. L. R., 389.

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maintaining the sentence, but as the case is not appealable I cannot do so, and I cannot direct the lower Court to enquire into the offence punishable under s. 53, because I could only make such order in case the accused had been discharged; s. 436, Criminal Procedure. I think I ought, therefore, to submit the case of accused No. 1 to the High Court to be dealt with under s. 439. I am inclined to think that the proper course would have been to prosecute, not him, but his master, under s. 60.

As to accused No. 2 the conviction seems unsustainable. Section 61 of the Excise Act must be read with s. 15, in which the quantity specified is 12 quart bottles. It is stated that the Board of Revenue have made an order, as they are empowered under s. 15, reducing the quantity to six quart bottles, but my attention has been directed to the case of *Empress* v. *Kola Lalang* (1), in which it is shewn that persons, who are not licensed vendors (and it is admitted that accused No. 2 is not one) do not commit an offence by possessing a less quantity than 12 quart bottles, though the quantity they possess may be greater than that authorized by the Board by virtue of the power conferred on them by s. 15. I would, therefore, recommend that the conviction of accused No. 2, who seems an innocent party, be set aside, and the fine ordered to be refunded to him.

No one appeared to argue the case.

The judgment of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

PRINSEP, J.—The second defendant must clearly be acquitted on the authority of the judgment of this Court in the case of *Empress* v. *Kola Lalang* (1) in which we concur.

The first defendant has in our opinion been properly convicted whether under s. 60 or s. 53 is immaterial—see *Queen* v. *Ishan Chunder Shaha* (2); *Empress* v. *Baney Madhub Shaw* (3). We would further observe that for reasons stated by the Sessions Judge himself, he need not have referred the case of this prisoner. A necessity for altering a conviction from one section to another for cognate offences when the accused has not been prejudiced by any such error is no sufficient ground for a reference to the Court of Revision.

(1) I. L. R., 8 Calc., 214.
(2) 19 W. R., Cr., 34.
(3) I. L. R., 8 Calc., 207 : 10 C. L. R., 389.

Before Mr. Justice McDonell and Mr. Justice Tottenham

CHUNDI CHURN MOOKERJEE AND OTHERS *v.* THE EMPRESS.*

Master and Servant—Criminal Act of Servant—Non-liability of Master —Indian Ports' Act (XII of 1875), s. 22.

1883 *March 7.*

The servants of a contractor who had engaged to discharge ballast from a ship lying in the port of Calcutta, threw the ballast into the river within the limits of the port, and thus committed an offence under s 22 of the Indian Ports' Act (Act XII of 1875). It did not appear that the contractor had abetted the offence.

Held, that he was not, in the absence of proof of abetment, liable for the acts of his servants.

Baboo *Umbica Churn Bose* for the appellant.

The *Standing Counsel* (Mr. *Phillips*) and Mr. *Adkin* for the Crown.

THE facts of this case sufficiently appear from the judgment of the Court (MCDONELL and TOTTENHAM, JJ.) which was delivered by

MCDONELL, J.—The appellant has been convicted before the Chief Presidency Magistrate of an offence against s. 22 of Act XII of 1875, by improperly discharging ballast from the ship *Ben News*, by the boats of Bishto Manjhi and Nufur Manjhi, by throwing it into the river within the Port of Calcutta, and has been sentenced to pay a fine of Rs. 250. The amount of the fine entitles the accused to appeal to this Court.

In our opinion the conviction is bad in law, for the facts proved or admitted do not establish any offence under the Act against the appellant. The first clause of s. 22 prohibits the casting of ballast or rubbish in the port without lawful excuse.

The next clause prescribes a penalty for whoever by himself or another so casts or throws the same, and for the master of any vessel from which the same is cast or thrown. It seems to us that to warrant the conviction under this section of a person, not being master of a vessel from which ballast is thrown, it must be shewn that the accused person, if he did not himself throw the ballast or

* Criminal Appeal No. 155 of 1883 against the order of F. J. Marsden, Esq, Chief Presidency Magistrate of Calcutta, dated the 21st February 1883.

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rubbish into the port, intentionally caused somebody else to commit that offence

In this case all that is proved or admitted against the appellant is that he made an agreement to remove the ballast from the ship *Ben Nevis*, that he engaged boats for that purpose; and that the ballast was removed from the ship in those boats The boatmen, instead of landing the ballast at the proper place, threw it into the river within the limits of the port They were arrested, convicted, and fined Proceedings were subsequently taken against the appellant under the same section, when the Magistrate held him "liable for his servant's act," and accordingly convicted and sentenced him We cannot bring ourselves to accept this doctrine as admissible in dealing with a person accused of an offence, unless his liability for the acts of another is specifically declared by statute The learned Standing Counsel who has supported the conviction admits that in a criminal trial the doctrine laid down by the Magistrate in this case would not be applicable, but he endeavours to distinguish this case from a criminal matter by describing it as *quasi*-criminal, or as one relating not to an "offence" but to a mere breach of rule And in such a case he submits that knowledge or intention on the part of the person who is accused in respect of something done by other persons is not essential

We cannot, however, apprehend the distinction so suggested as entitling a Criminal Court to place a person accused of what is described as a *quasi* criminal act at a disadvantage from which one charged with serious crime would be protected, *viz*, being held responsible for the acts of another without any proof of abetment or connivance on his part, and, in the absence of any statutory provision, fixing him with such responsibility We observe that Act XII of 1875 in Chapter VIII refers to breaches of it as "offences" makes them liable by a Magistrate, and provides for the enforcement of penalties on conviction The trial then is, we apprehend, a criminal trial, and the same principles will apply to it as to other criminal trials

If the Legislature had intended to make persons in the appellant's position criminally liable for acts done by persons employed

by them without proof of connivance, it would surely have provided for this in the Act. The very section (22) and following sections do enact that the master of any vessel shall be liable to be punished for acts done on board in breach of the rules laid down, though they may possibly be done without his knowledge, or even against his orders. This specific creation of criminal liability as against the master shews that without it he would not be liable for an act not done, or expressly permitted by himself.

We find nothing in the Act which renders the appellant liable to punishment for the acts done by others not proved to have been by his abetment or connivance. We therefore set aside the conviction and direct that the fine, if paid, be refunded.

For these reasons we set aside the convictions and sentences in appeals Nos. 156 and 157.

Convictions set aside.

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APPELLATE CIVIL.

Before Mr. Justice Cunningham and Mr. Justice Maclean.

LAKHIMONI CHOWDHRAIN (DEFENDANT) *v.* AKROOMONI CHOWDHRAIN (PLAINTIFF). *

1883 *May* 9.

Registration Act (III of 1877), *ss*, 74, 77—*Refusal to execute deed—Suit to compel registration.*

If the non-registration of a deed has resulted from the refusal of one of the parties to it, to execute it, that matter must be enquired into by the Registrar, as directed by s. 74 of the Registration Act, before any right to sue under s. 77 can arise, and unless the requirements of the Act have been complied within, no cause of action arises under s. 77.

Edun v. *Mahomed Siddik* (1) followed.

THIS was a suit under s. 77 of the Registration Act (III of 1877) to enforce registration of a kobala. The defendant denied execution. An attempt had been made to register the deed before the Sub-Registrar who refused to register it upon the ground

*Appeal from Appellate Decree No. 238 of 1882, against the decree of Baboo Nobin Chunder Gangooli, Second Sub-Judge of Dacca, dated the 9th December 1881, reversing the decree of Baboo Kalidhun Chatterjee, Second Munsiff of Moonshigunge, dated the 7th February 1881.

(1) *Ante*, p. 150.

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that it had not been presented by a proper person, and that his registration fees had not been paid. An appeal was preferred to the Registrar who held that the Sub-Registrar was right in refusing registration. The present suit was then instituted praying for a declaration that the defendant had executed the deed and for an order directing the Sub-Registrar to register it within thirty days. It was admitted that the defendant had not appeared before the Registrar. The Munsiff dismissed the suit. On appeal this decision was reversed. The defendant appealed to the High Court.

Mr. *O'Kinealy* and Baboo *Aukhil Chunder Sen* for the appellant.

Baboo *Hem Chunder Banerjee* and Baboo *Lall Mohun Dass* for the respondent.

The following judgments were delivered :—

CUNNINGHAM, J.—The order of the Sub-Registrar, which was the commencement of the proceedings out of which this suit has arisen, sets forth certain circumstances which occurred before him in connection with the application for registration. It then went on to state that Mohesn, the person applying for registration, had stated that it was not his deed, and that he did not pay the fees on being asked for them. It then continued "the deed has not agreeably to s. 42, clause 7 of the rule in force been presented by a proper person, and the fees have not according to s. 66 been paid. Therefore, the registration of the deed is rejected."

From this order there was an appeal to the Registrar who passed the following order: "The rural Sub-Registrar was right in refusing registration, as he was unable to satisfy himself that it had been presented by a person authorized to do so, and because the proper fee was not paid. Appeal dismissed."

It is contended on behalf of the appellant that upon these orders the present suit could not be brought, or that, if brought, all that could be enquired into would be the question whether or not the Sub-Registrar and Registrar were right in holding that a proper presentation of the deed for registration had not been made.

On behalf of the respondent it has been urged that, inasmuch as there had been a refusal by the Sub-Registrar to register, and as

that refusal had been appealed against to the Registrar the respondent was at liberty to bring this action under s. 77, and in that action to raise the whole question whether or not the deed had been executed by the defendant, and whether it ought not therefore to be registered.

I do not think that this contention is right. It appears to me that the contention of the appellant is sound, that if the non-registration of the deed has resulted from the refusal of one of the parties to it to execute it, that matter must be enquired into by the Registrar, as directed by s. 74, before any right to sue under s. 77 would arise; and my opinion is, following the ruling of this Court in *Edun* v. *Mahomed Siddik* (1) that unless the requirements of the Act have been complied with, no cause of action arises under s. 77.

I am, therefore, of opinion that the decree of the lower Appellate Court must be set aside, and that of the original Court dismissing the plaintiff's suit restored with costs throughout.

MACLEAN, J.—In my opinion this suit cannot be maintained, either under s. 77 of the Registration Act or under the general provisions of the Code.

To maintain this suit it was indispensable, I think, that the requirements of the Act as to presentation of the document by some one executing it should have been found; but this has not been done. The Subordinate Judge does indeed find that the defendant went in a boat to the Sub-Registrar, but he evidently went to the place where the Sub-Registrar's Office is, for it is common to both plaintiff and defendant that the defendant did not appear before the Sub-Registrar. There is, therefore, no finding that the defendant appeared before the Sub-Registrar. He could not, therefore, register, and was bound to refuse to register the document; and the first Court could not properly direct that a document not presented according to law should be registered.

I think, on the authority of the case of *Edun* v. *Mahomed Siddik* (1) the appeal should be decreed and plaintiff's suit dismissed with all costs.

Appeal allowed.

(1) *Ante*, p. 150.

Before Mr. Justice Cunningham and Mr. Justice Maclean.

1883
May 8.

DAGAI DABEE (DEFENDANT) *v.* MOTHURA NATH CHATTOPADHYA AND OTHERS (PLAINTIFFS).*

Hindu law, Gift—Possession retained by Donor—Transfer of Possession—Symbolical transfer.

A gift by a Hindu, unaccompanied either by possession on the part of the donee or any symbolical act, such as handing over documents of title, or permitting the donee to receive rents, is not in itself a valid transaction, even though the deed of gift be registered.

Baboo *Rasbehari Ghose* for the appellant.

Baboo *Durga Mohun Dass* and Munshi *Serojul Islam* for the respondents.

THE facts of this case sufficiently appear from the judgment of the Court (CUNNINGHAM and MACLEAN, JJ.) which was delivered by

CUNNINGHAM, J.—In this case the question raised is, whether the gift of a house in a case in which the donor reserved to himself the right of remaining in the house for the term of his life, and which was unaccompanied by any act of physical delivery, or any symbolical act by which physical delivery could be held to be implied, is valid.

No case supporting the view of the respondent that such a gift is valid has been brought to our knowledge.

In the present instance the donees appear to have never in any way had delivery of the house, and the only incident which can be regarded as symbolical of delivery is registration of the deed of gift.

With regard to registration it was contended by the respondent that the Full Bench Ruling in *Narain Chunder Chuckerbutty* v. *Dataram Roy* (1) had laid down that possession was necessary neither for a sale nor a gift. We find, however, that the learned

* Appeal from Appellate Decree No. 314 of 1882, against the decree of Baboo Gunga Churn Sircar, Sub-Judge of Dacca, dated the 9th December 1881, reversing the decree of Baboo Kalidhun Chatterjee, Second Munsiff of Munshigunj, dated the 17th May 1881.

(1) I. L. R., 8 Calc., 597.

Judges in that case confined themselves strictly to a case where there has been a sale of property for valuable consideration, and where the document evidencing that sale has been registered. Their Lordships appear to have referred to the general course of dealings with regard to property, and to have considered that the general usage of the province had had the effect of dispensing with actual delivery in the case of sales for valuable consideration. No case, however, has gone the length, so far as we are aware, of saying that a gift by a Hindu, unaccompanied either by possession on the part of the donee or any symbolical act, such as handing over documents of title, or by permitting the donee to receive rents, or other like act, is in itself a valid transaction, even though the deed of gift be registered. On the other hand, we think that the decision in *Kishto Soondery Debia* v. *Ranee Kishto Motee* (1) must be taken as laying down that in such a case as this no valid binding transaction has taken place, until the donee has either actually or symbolically taken possession of the gift.

We think, therefore, that the decree of the lower Appellate Court must be reversed, and that of the original Court restored with costs throughout. *Appeal allowed.*

Before Mr. Justice Prinsep and Mr Justice O'Kinealy.

CHUNDER NARAIN SINGH (DECREE-HOLDER) *v.* KISHEN CHAND GOLECHA (JUDGMENT-DEBTOR).*

1883 *March 2.*

Landlord and Tenant—Arrears of Rent—Decree for arrears of rent—Sale for arrears of rent—Insolvency—Official Assignee—Beng. Act VIII of 1869, *ss.* 59 *and* 60—*Insolvent Act,* 11 *and* 12 *Vict.,* c. 21.

A decree for arrears of rent of an under-tenure was obtained against a tenant who became an insolvent, and whose tenure became vested in the Official Assignee by virtue of the provisions of the Indian Insolvent Act, 11 and 12 Vict, c. 21. An application was made under ss. 59 and 60 of the Rent Law, Beng. Act VIII of 1869, for an order that the tenure should be sold for its own arrears. The Official Assignee objected to the sale, and contended that the decree-holder's only right was to prove in the insolvency for the amount of his debt.

* Appeal from Original Order No. 304 of 1882, against the order of S. H. C. Taylor, Esq, Judge of Beerbhoom, dated the 1st September 1882.

(1) Marsh., 367.

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CHUNDER NARAIN SINGH v. KISHEN CHAND GOLECHA.

Held, that, whether the arrears of rent became due before or after the insolvency of the judgment-debtor, the decree-holder was entitled to sell the tenure in execution of his decree.

THIS was an application for execution made in the Court of the District Judge of Beerbhoom. In rejecting the application the Judge said :—

"This case is similar to execution case No. 82 of 1880. A decree was obtained in the Court of the Subordinate Judge of Moorshedabad for arrears of rent, against the Official Assignee on behalf of the insolvent Kishen Chand Golecha. This decree has been transferred to this Court with a certificate of non-satisfaction, and filed here. Execution of this decree has been sued out here, and the under tenure, in respect of which such arrears were due, has been attached. The Official Assignee now raises an objection to the sale of that property on the ground that all properties of the insolvent had by orders of the High Court been previously vested in him, and that this Court has no jurisdiction." It seems the suit had been instituted against the insolvent as well as the Official Assignee.

The District Judge refused the application, and the decree-holder appealed on the grounds (1), that under the Rent Law the arrears of rent are a charge on the tenure, and, therefore, the sale should have been allowed; (2), that the tenure was liable to be sold for its own arrears, no matter into whose hands it had passed.

Baboo *Guru Dass Banerjee* and Baboo *Bhoobun Mohun Dass* for the appellant.

Baboo *Saligram Singh* for the respondent.

The judgment of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

PRINSEP, J.—In this case the plaintiff, having obtained a decree against the Official Assignee for arrears of rent due on a patni tenure, attempted to sue out execution by attachment and sale of the tenure for which the arrears are due. The Official Assignee objected and stated that the landlord was not entitled to sell the tenure, but must come in like any other creditor. Neither of the Courts state whether the arrears said to have been due accrued before the property of the insolvent vested in the Official Assignee,

or while it was under his charge. If the Official Assignee neglected to disclaim or get rid of the lease, he would become liable for the rent due after the property of the insolvent debtor vested in him. This is clear from *Ex-parte Davis* (1) and *Ex-parte Dressler* (2). But even if the arrears were due from the insolvent before he took the benefit of the Insolvent Debtor's Act, we think that the landlord was entitled to sell the tenure. This very point was raised before the Madras High Court in the case of *Chinna Subbarya Mudali* v. *Kandaswami Reddi* (3). Mr. Justice Holloway, who delivered the judgment of the Court, said * * * "It appears to me no interest in the particular property in question vested in the Official Assignee by the vesting order. The interest of the potta-holder is one dependent upon his payment of rent, and if he does not pay, his right to hold ceases and becomes saleable for whatever it is worth for the arrears. It is a case of a contract, a contract of letting, and the Official Assignee must have expressed his election to take it and must have taken it *cum onere*, otherwise he acquired no right or interest in the land." In this view we concur, and we think that the lower Court was wrong in not allowing the under-tenure to be sold.

The appeal is allowed with costs. The case will go back to the lower Court with a direction to proceed with the execution.

Appeal allowed.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

NILMADHUB CHUCKERBUTTY (JUDGMENT-DEBTOR) *v.* RAMSODOY GHOSE (DECREE-HOLDER).*

1883 *March 2.*

Execution of Decree—Decree payable by instalments—Instalments—Construction of Decree—Limitation.

A consent decree for Rs. 350 directed payment of the money by fourteen half-yearly instalments of Rs. 25 each, in Cheyt and Assin of each year, the first instalment to be paid in the month of Cheyt 1283 (March-April 1877).

* Appeal from Appellate Order No. 249 of 1882, against the order of Baboo Brojendro Coomar Seal, Judge of Bancoora, dated the 26th May 1882, reversing the order of Baboo Taraprossonno Ghose, Munsiff of Kutulpore, dated the 25th March 1882.

(1) L. R. 3 Ch. D., 463. (2) L. R. 9 Ch. D., 252.

(3) I. L. R., 1 Mad., 59.

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The decree contained a provision that in default of payment of any one instalment, the execution-creditor should have the option of executing the decree for the whole amount remaining unpaid Default was made in payment of the first instalment, but the judgment-debtor paid up (not on due date) the instalment which fell due up to, and including Assin 1285 (October-November 1878), when he stopped making any payments. On the 26th of November 1881 the decree-holder applied for execution in respect of all sums then remaining unpaid under the decree. The District Judge allowed execution to issue for all sums which had fallen due within three years previously to the date of the application for execution, but refused to allow execution to issue in respect of the instalments not then due.

Held, that the execution-creditor must be considered to have waived his right to execute the decree for the whole amount, but was entitled under the decree to realize any instalments which were still due.

THIS was an application for execution of decree. The Court of first instance rejected the application. This decision was reversed by the District Judge. The judgment-debtor then appealed to the High Court. The following is the judgment appealed from :—

The question which has to be decided in this case is, whether execution is barred by the law of limitation. The decree which bore date the 26th of February 1877 directed the payment of Rs. 350 by instalments, *viz.*, Rs. 25 in Cheyt 1283 (March-April 1877). In Assin (October-November) and Cheyt of each year from 1284 to 1289, Rs. 25, and in Assin 1290, Rs. 25. The decree provided, further, that in case of default in the payment of any one instalment the whole should be realized in execution. Although the language of the decree about the penalty is a little obscure, yet there can be very little doubt that the intention of the parties was, that in case of default in the payment of any one instalment the whole amount, which would remain unpaid, should be realized at once in execution.

According to the decree-holder, the first default took place in Cheyt 1283, but he went on receiving payments, notwithstanding that there were successive defaults. Up to the Assin kist of 1285 the debtor has paid, and the remaining amounts are yet due.

The decree-holder considered that every default would give him a fresh start, and so on the 26th November 1881, (and not on the 11th November as the first Court supposed) the decree-holder applied for the realization of the whole amount yet due.

The first Court held that the decree-holder having come to Court after the expiration of three years from the end of Cheyt 1283, execution was barred. The Munsiff refers to Art. 75 of Schedule II of the Limitation Act, but that article has nothing to do with execution applications. The case has to be decided by reference to the 6th Clause of Art. 179 of Schedule II.

I have carefully read the case cited by the appellant on the one hand, *Asmutullah Dalal* v. *Kally Churn Mitter* (1) and that quoted by the respondent, *Ugrah Nath* v. *Lagunmani* (2). The case last cited does not help the respondent. There, the decree provided that in case of default possession should be obtained, and inasmuch as the decree-holder had not come within three years, it was ruled that he was not entitled to get possession. Similarly it may be held in this case, as it was held in *Ugrah Nath* v. *Lagunmani* (2), that the decree-holder not having come within three years from the first default, he could not pray for the realization of the whole amount; but to use the language of the High Court in *Asmutullah Dalal* v. *Kally Churn Mitter* (1), "we think that the decree-holder is still entitled to the benefit of Clause 6 of Article 179 as respects any instalments ordered in the decree, and which fell due on dates not exceeding three years before the application was filed."

The decree-holder is certainly not entitled to take out execution with respect to amounts which have not fallen due. It was also urged by the appellant that the payment made by the debtor was a step in aid of execution. That is a wrong view of the meaning of the phrase, "step taken in aid of execution." The judgment of the first Court is set aside, and the records of the case are sent back to the Court below, in order that the decree-holder may be allowed to amend his application for execution in accordance with the view set forth above.

The judgment-debtor appealed on the grounds (1), that the Judge was wrong in allowing execution to issue in respect of instalments which had fallen due within three years; (2), that execution was barred when not issued within three years of the first default in Cheyt 1283; (3), that the Court should not have allowed the decree-holder to amend his application.

Baboo *Bama Churn Banerjee* for the appellant.

Baboo *Rajender Nath Bose* for the respondent.

The judgment of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

PRINSEP, J.—In this case the decree, which was drawn up by consent of parties, declares that, the decretal amount should be paid in instalments, namely, Rs. 25 in Cheyt 1283, in Assin and Cheyt of each year from 1284 to 1289, Rs. 25, and in Assin

(1) I. L. R., 7 Calc., 56.
(2) I. L. R., 4 All., 83.

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1290, Rs. 25. It also provides that the decree-holder on default of payment of any instalment may execute the decree for the whole amount not paid. In Cheyt 1283 a default was made; but notwithstanding three instalments were afterwards received by the judgment-creditor.

The question now is, whether the application to execute the decree having been filed more than three years after Cheyt 1283, when the entire amount could be realised in execution on failure to pay an instalment, execution is not barred by limitation, or whether it can be executed for the amount of the remaining instalments within three years from the time when each became due.

The Munsiff dismissed the application.

We have had the decree read out to us, and, though it is not expressed in as clear and precise language as we would expect to be used in a document of this nature, we think that, on a proper consideration of that document, the decree-holder had, on default of payment of any instalment, a mere election to enlarge his power, and instead of executing the instalment decree, to execute the decree for the whole amount, and at his option proceed to realise the whole amount due. This clause in the decree which enlarged his power was made solely for the protection and benefit of the decree-holder. It does not infringe on any public right or public policy, or affect the right of any third party, and there was nothing to prevent the judgment-creditor's waiving any advantage that he might obtain under it. In the present case he never exercised the election to realize the whole amount, but on the contrary received instalments due subsequent to the default. He must therefore be held to have waived his right to execute the decree for the whole amount, but he is entitled under the decree to realize instalments still due. Art. 179, cl. 6 does not apply to such a decree.

We dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

GOLAM ABED (DEFENDANT) *v.* TOOLSEERAM BERA (PLAINTIFF.)*

1883
March 5.

Absconding of Accused—Attachment by Magistrate—Execution of Decree—Sale in Execution of Decree—Sale by Magistrate—Code of Criminal Procedure, (Act X of 1872), ss. 172, 173.

A, having been accused of an offence under the Indian Penal Code, absconded, and his property was on the 7th of August 1878 attached by the Magistrate under s. 172 of the Code of Criminal Procedure, Act X of 1872. While the property was so under attachment, it was attached by *B* in execution of a money-decree against *A*, and sold on the 15th of January 1879, *B* being the purchaser. On the 21st of April 1880, the Magistrate sold the property to *C*. It did not appear whether the time fixed by the Magistrate's proclamation for *A's* appearance had expired at the date of the sale to *B*.

Held, in a suit for possession by *B* against *C*, that the title obtained by *C* under the Magistrate's sale was superior to the title (if any) obtained by *B* at the sale in execution of the money-decree.

Semble, that after the date of the attachment by the Magistrate under s. 172 of the Code of Criminal Procedure and during its continuance, no title could be conferred by an attachment and sale subsequently made in execution of a money-decree.

THIS was a suit for possession of certain plots of land. The judgment appealed from was as follows:—

It appears that the property in dispute belonged to two brothers, Boidonath and Kasinath, who had equal shares in it. Boidonath, who was accused of an offence under the Penal Code, absconded, and the property in dispute was attached by the Magistrate on the 11th of August 1878, under s. 172 of the Civil Procedure Code. During the subsistence of this attachment the plaintiff (respondent) attached the property for debts due from both Boidonath and Kasinath, and sold and purchased it himself on the 15th of January 1879. The Magistrate then subsequently sold the right, title and interest of Boidonath (which was only a moiety share), and the appellant (Sheik Golam Abed) purchased it on the 21st of April 1880. The question is whether the plaintiff's purchase of Boidonath's share can be held good after the attachment made by the Magistrate under s. 172

* Appeal from Appellate Decree No. 952 of 1882, against the decree of Baboo Jodunath Roy, First Subordinate Judge of Midnapore, dated the 24th March 1882, affirming the decree of Baboo Juggodishur Gupto, Munsiff of Newal, dated the 31st December 1880.

1883

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of the Criminal Procedure Code. It was contended that after attachment by the Magistrate the property should be considered to have been at the disposal of the Government, and, therefore, the plaintiff had no right to attach and sell it in execution of his decree. Reading s. 172, it appears to me that the property which was attached was not to be considered at the disposal of Government as soon as it was attached, but when the time specified in the proclamation for the absent person to appear expired.

In this case it does not appear whether the time fixed for Boidonath's appearance expired before or after the plaintiff's sale, and, therefore, I cannot say that the property was at the disposal of Government at the time when the plaintiff purchased it. The defendant ought to have shewn that a proclamation was issued before the plaintiff's purchase, and that the time specified in it for Boidonath's appearance expired before the plaintiff's purchase I think, therefore there is no ground for interfering with the lower Court's judgment, and therefore it is dismissed with costs.

The defendant appealed to the High Court on the grounds (1), that nothing passed to the plaintiff at his sale; (2), that the defendant was entitled to priority over the plaintiff; (3), that the lower Court misconstrued s. 172; (4), that the lower Court was wrong in holding that the defendant was bound to show that a proclamation had issued before the plaintiff's purchase.

Moonshi *Serajul Islam* for the appellant.

No one appeared for the respondent.

The judgment of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

PRINSEP, J.—The property, which is the subject of the present appeal, was attached by the Magistrate under s. 172 of the Code of Criminal Procedure (Act X of 1872), in consequence of the proprietor Boidonath Dutt absconding when accused of committing a criminal offence. The date of the attachment is stated to be the 7th of August 1878. Subsequently a third person, who held a decree against Boidonath Dutt, proceeded to execute it, and attached the same property, which was sold to the plaintiff on the 15th of January 1879. Notwithstanding these proceedings the attachment under the order of the Magistrate still continued, and it appears that, as Boidonath Dutt did not appear within the period specified in the proclamation issued under s. 171, the pro-

perty at once became (to use the term posal of Government." We understand by this expression that it came under the absolute control of Government to dispose of, or deal with it, in whatever manner might seem most appropriate and convenient. In April 1880, the Magistrate at a public sale sold the rights of Government to the defendant. We have therefore in the present suit to determine which of these sales conferred the title to this property.

The Subordinate Judge has given the plaintiff a decree as against the defendant, because in his opinion the defendant ought to have shown that the proclamation had issued before the plaintiff's purchase, and that the time specified in it for Boidonath's appearance expired before the plaintiff's purchase.

These reasons appear to us to be altogether unsound, for the Subordinate Judge should have presumed in accordance with s. 114 (*e*) of the Evidence Act that the judicial acts of the Magistrate were regularly performed, that is to say that, unless the contrary was shown, the proclamation under s. 171 had been properly issued; that Boidonath did not appear within the time specified in the proclamation; and that the property having become at the disposal of Government, the Magistrate transferred it to the defendant. As regards the title of the defendant it appears to us that, so long as the attachment by the Magistrate continued, no title could be conferred by any attachment subsequently made. Section 172 provides that if the person to whom the property belongs does not appear within the specified period, his property (not his right, title and interest) shall be at the disposal of Government, and from the terms of s. 173 it would appear that if the property has been sold, although the person to whom it belonged might be able to show to the satisfaction of the Magistrate that he was not at fault, and therefore not properly responsible for the sale, even then the sale is not to be set aside, and the property restored, but the proceeds of the sale are to be made over to the proprietor.

Under these circumstances the suit must be dismissed, the orders of the Courts below being set aside with costs in all the Courts.

Appeal allowed.

Before Mr. Justice Cunningham and Mr. Justice Maclean.

1883
February 8.

BIDHU BHUSHUN BASU AND OTHERS (PLAINTIFFS) *v.* KOMARADDI MUNDUL AND ANOTHER (DEFENDANTS).*

Enhancement of rent, Suit for—Co-sharers—Notice of enhancement—Parties.

A and *B* were taluqdars of a certain village, each having an eight annas share. A certain ryot held a jote within the village, in respect of which he paid his rent separately—eight annas to *A* and eight annas to *B*. *A* served a notice of enhancement on the ryot, but the notice was signed by *A* only, and it did not appear that the consent of *B* had been previously obtained. *A* afterwards instituted a suit for arrears of rent at the enhanced rate, making *B* a defendant to the suit.

Held, that the notice of enhancement was sufficient to maintain a suit so framed.

* In this case it appeared that village Baruipara, in pergunnah Mahomedshahi, station Nowpara in the District of Nuddea, was the patni taluk of the plaintiffs and one Shoshi Bhusun Sircar, the share of the plaintiffs being eight annas. Komaraddi Mundul was a ryot having a right of occupancy within the taluk, and who paid his rent separately—eight annas to the plaintiffs and eight annas to Shoshi Bhusun Sircar. The plaintiffs served a written notice of enhancement on Komaraddi Mundul, but this notice was not signed by Shoshi Bhusun Sircar, nor had his consent to serve it been previously obtained. Komaraddi neglected to pay the enhanced rent required, and the plaintiffs brought the present suit against him for arrears of rent at the enhanced rates mentioned in the notice. Shoshi Bhusun Sircar was made a party defendant to the suit. The Court of first instance dismissed the suit on the authority of *Guni Mahomed* v. *Moran* (1), and this decision was upheld on appeal, the Judge citing *Kasheekishore Roy Chowdhry* v. *Alip Mundul* (2).

* Appeal from Appellate Decree No. 1323 of 1881, against the decree of Baboo Amrito Lall Chatterjee, Subordinate Judge of Nuddea, dated the 4th April 1881, affirming the decree of Baboo Behari Lall Banerjee, Second Munsiff of Kooshtea, dated the 11th March 1880.

(1) I. L. R., 4 Calc., 96.

(2) I. L. R. 6 Calc., 149.

The plaintiffs appealed to the High Court on the ground that the lower Court was wrong in declaring the notice insufficient.

Baboo *Mohini Mohun Roy* and Baboo *Kali Churn Banerjee* for the appellants.

Baboo *Sreenath Banerjee* for the respondents.

The judgment of the Court (CUNNINGHAM and MACLEAN, JJ.) was delivered by

CUNNINGHAM, J.—This was a suit for rent at an enhanced rate. The defence raised was that the notice of enhancement was signed, not by the whole body of landlords, but by the plaintiffs alone, who held an eight annas share, and separately collected their rent from the defendants. The question we have to decide in second appeal is, whether this notice was good. This question has, in our opinion, been decided in the affirmative by the observations of the Chief Justice in the Full Bench case of *Chuni Singh* v. *Hera Mahto* (1). We understand the meaning of the Chief Justice to be that a suit by a portion of the co-sharers for rent at an enhanced rate may be brought, provided the other co-sharers are joined in the suit either as plaintiffs or defendants; and that, in such a case, notice may be duly given by that portion of the co-sharers by which the suit is instituted. We think, therefore, that the question is no longer open to discussion. The present appeal must accordingly be admitted, and the case remanded to the Court of first instance for trial on the merits.

Appeal allowed and case remanded.

Before Mr. Justice Cunningham and Mr. Justice Maclean.

KEDARNATH MITTER (PLAINTIFF) *v.* SURENDRO DEB ROY AND OTHERS (DEFENDANTS).*

1883 *April* 30.

Registration Act (III of 1877), s. 17—Lease or agreement to lease.

In a suit for possession of certain property and for the execution of a pottah, it appeared that two of the defendants had executed an agreement which was duly registered, by which they acknowledged the receipt of a

*Appeal from Original Decree No. 98 of 1881, against the decree of Baboo Bhoobun Chunder Mukerjee, First Sub-Judge of Alipore, dated the 10th February 1881.

(1) I. L. R., 7 Calc., 633.

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portion of the *salami*, and covenanted to execute a pottah on a certain day. This agreement was afterwards confirmed by two of the defendants who were minors when it was entered into: the confirmation was by deed which was duly registered. Subsequently all the defendants executed a document, which provided for the payment of a portion of the *salami* on the day when possession should be given as provided in the first agreement, and for the payment of the remainder by instalments which were to carry interest. This document was not registered.

Held, that it was not a "lease or agreement to lease" within the meaning of s 17 of the Registration Act, and was admissible in evidence.

Mr. *Evans*, Baboo *Sree Nath Doss*, Baboo *Guru Doss Banerjee*, Baboo *Kali Doss Bhunjo*, and Baboo *Mohib Chunder Bose* for the appellant.

Baboo *Mohini Mohun Roy*, Baboo *Ras Behary Ghose*, and Baboo *Jogesh Chunder Dey* for the respondents.

THE facts of this case sufficiently appear from the judgment of the Court (CUNNINGHAM and MACLEAN, JJ.) which was delivered by

CUNNINGHAM, J.—The plaintiff sues to have it declared that three documents, constituting his patni right in certain properties are in force, to be put in possession of the properties, and that the defendants may be ordered to execute a patni pottah in respect of the taluks recorded in the Collector's towjee, and a mourasi and mokurari pottah in respect of the tikka and other mehals, and to accept a kabuliat for the same from the plaintiff.

The first of these documents was dated 28th Pous 1283, and was executed by the defendants 1 and 2; the second was executed on 21st Bysack 1286 by the defendants 3 and 4, assenting to the terms of the first agreement; and the third on the 26th Srabun 1286 executed by the four defendants modifying the terms of the first.

The questions raised in this appeal are, first, whether the third document is inadmissible in evidence for want of registration; and, secondly, whether, if it is inadmissible, specific performance of the other two contracts can be decreed.

In the first of the three documents the defendants 1 and 2 covenanted that they would grant to the plaintiff a mourasi mokurari istemrari patni pottah of the lands mentioned; they admitted receipt of Rs. 4,000 out of Rs. 38,000, the bonus of the

patni; they stated that the permanent rental of the patni, after deducting collection expenses, would be Rs. 33,126-11; that on payment of a further portion, Rs. 5,000, of the bonus, the plaintiff should be put in possession; that the patni rent should be payable in monthly instalments; that the first defendant would cause her second and youngest sons, the third and fourth defendants, to execute the patni and have it registered that of certain arrears which had accrued, the plaintiff was to pay ten annas to the defendants, paying it in specified instalments and was to keep six annas; that the plaintiff should pay the defendants road-cess, &c. This document was registered on the 13th May 1879.

The second document was executed by the two younger brothers, and ratified the first, but provided that in addition to the bonus specified in the first agreement a *nuzzur* of Rs. 4,000 should be presented to them, and that on payment of these two sums before 22nd Jeyt a pottah should be executed and registered. This document was also registered, 13th December 1879, the two brothers admitting execution, but refusing to sign the endorsement on the ground that it had been subsequently superseded by the acts of the plaintiff.

The third instrument was as follows: "To Kader Nath Mitter, worthy of blessing! May our highest wishes for your welfare attend you.

"With reference to the future settlement in respect of our zemindari, ticca *lakhiraj*, and daphaot, &c., estates situate in the southern quarter which we have determined to make agreeably to the purport of the agreement of the 28th Pous 1285, *one or two terms therein being wanting to complete it*, it is this day settled that you should have *to pay the sum Rs.* 6,000 *as salami to* my three *sons*, and that out of the same Rs. 3,000 should have to be paid to my three sons on the date of delivery of possession as provided in the said agreement, *i.e.*, you should pay the said Rs. 3,000 *on or before Tuesday the 28th or Wednesday the 29th Srabun, and the balance of Rs.* 3,000 *on the date of the pottah*, and by paying the residue of the bonus within a period of 45 days next after possession in the mofussil you should take a pottah and give a kabuliat. Further you should pay a sum *of Rs.* 9,000 *on*

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account of the patni bonus on the 31st day of Srabun next; in case you fail to do so, you are to pay *interest at the rate of Rs.* 1-8 *per cent. per mensem* from the said month of *Srabun. You must pay the monthly rent on the due date*, failing to do which, you should pay *interest at the rate of* 8 *annas per cent. per mensem* from the due date. In addition to the amount of bonus provided for in the agreement, you should pay a sum of Rs. 2,000 *in the shape of bonus*, but you are to pay the said sum subsequent to the auction *kist* in the month of Pous next. All other conditions shall be duly provided in the pottah and kabuliat."

This document was executed by all the defendants, but was not registered, and the question is, whether its non-registration renders it inadmissible in evidence.

This depends on the meaning to be given to s. 17 of the Registration Act III of 1877.

Its first provision is that a salami of Rs. 6,000 should be paid to the three sons, half on the day of delivery of possession as fixed by the first agreement, which it stated to be 28th or 29th Srabun, and the balance within 45 days after possession, upon which a pottah and kabuliat should be exchanged; it provided that Rs. 9,000 on account of the patni bonus should be paid on 31st Srabun then next, failing which it should bear interest; that on failure to pay the monthly instalments plaintiff should pay interest at Rs. 1-8 per mensem; that he should pay an additional Rs. 2,000 in shape of bonus, but subsequent to the auction *kist* in Pous then next.

This document did not in our opinion amount to a "lease or agreement to lease;" it was merely a provision for certain payments to the landlords by way of consideration in addition to those already agreed on; and that in the case of arrears certain interest should be payable. Such an agreement might, we consider, be properly regarded as falling within cl. (b) of s. 17, and so be exempted from registration under cl. (b.)

The appeal must, therefore, be decreed, the judgment of the Original Court set aside, so far as it concerns the respondents, defendants 3 and 4, and the case remanded for trial on the merits. Costs of this appeal to be paid by the defendants 3 and 4.

This judgment renders it unnecessary for us to deal with the objections raised by the respondents. The matters referred to in those objections can be disposed of if necessary at the hearing by the Original Court.

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Appeal allowed.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

IN THE MATTER OF BHAOBUNESSURY.

BHAOBUNESSURY *v.* JUDOBENDRA NARAIN MULLICK.*

1882 *June* 20.

Limitation Act (XV of 1877), Sch. II, Art. 164—Code of Civil Procedure, (X of 1877), s. 108—Ex-parte Decree—Setting aside ex-parte Decree.

An *ex-parte* decree was obtained against a defendant who applied to have it set aside under s 108 of the Civil Procedure Code. The application was made more than thirty days from the date of attaching the defendant's property in execution of the decree, but within thirty days of the service of the sale proclamation

Held, that the application was barred by limitation under Art. 164, Sch. II, Act XV of 1877.

IN this case the judgment appealed from was as follows :—

"This is an application made by the petitioner to set aside an *ex-parte* judgment passed against her and another defendant named Gour Loll Chowdhry on the 18th of July 1881, on the ground that the summons was not served at the residence of the petitioner, and that the petitioner is not aware of the service of summons.

"The plaintiff pleads limitation, and alleges that the summons was duly served. I think the application is barred by limitation, it having been brought after the lapse of thirty days from the date of completely executing the process of attachment, issued at the plaintiff's instance for enforcing the judgment, Art. 164, Schedule II of the Limitation Act. The attachment was made on the 9th, 13th, and 18th of September, and the present application was presented on the 4th of January last. There is no reason why the Court should not in this case presume, under s. 114 of the Evidence Act, that the attachment, which is an official act, was regularly made. The presumption arising under the section has not been rebutted by any evidence. As the application was not made in time, it must be considered barred by limitation. The application is, therefore, refused.

* Appeal from Original Order No. 90 of 1882, against the order of Baboo Aughur Nath Ghose, Subordinate Judge of Dinagepore, dated the 6th April 1882.

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The petitioner appealed to the High Court on the ground that "your petitioner, having applied to set aside the *ex-parte* decree within thirty days from the date of the service of sale proclamation, and your petitioner not having been aware of the service of attachment process before, the Subordinate Judge was wrong in holding that your petitioner's application was made beyond the period prescribed by the law of limitation."

Baboo *Ishur Chunder Chuckerbutty* for the appellant.

Baboo *Boikunt Nath Dass* for the respondent.

The judgment of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

PRINSEP, J.—The lower Appellate Court has held that the application under s. 108 of the Code of Civil Procedure of 1877 is barred, inasmuch as it was not made within thirty days from the date of executing the process, that is, the attachment in execution of the *ex-parte* decree. For the judgment-debtor it is contended that there was no such attachment made, and that this application is in time. The lower Court, however, held that in the absence of any evidence on the part of the defendant, it would, under s. 114 of the Evidence Act, presume that the attachment was properly made.

We think that the view taken by the lower Court was perfectly correct, and that it was incumbent on the defendant judgment-debtor to show that he made his application under s. 108 within thirty days from the date of the first process in execution of the decree passed against him. Having failed to do so, his application was correctly disallowed as barred. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

Before Mr. Justice Mitter and Mr. Justice Wilkinson.

HET NARAIN SINGH (DEFENDANT) *v.* RAM DEIN SINGH AND OTHERS (PLAINTIFFS).*

1883 *April* 20.

Hindu law—Contract—Interest exceeding principal—Suits between Hindus in Mofussil—Act XXVIII of 1855, *s.* 2.

In suits between Hindus in the mofussil interest exceeding the principal may be awarded.

Baboo *Chunder Madhub Ghose* and Baboo *Aubinash Chunder Bannerjee* for the appellant.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Rughoo Nundun Persad* for the respondents.

THE facts of this case sufficiently appear from the judgment of the Court, which was delivered by

MITTER, J.—This is an appeal against the decision of the Subordinate Judge of Shahabad in a suit upon a bond. The only question raised in the appeal is, whether the decree for interest from the date fixed in the bond for the repayment of the loan at the particular rate mentioned in the bond is correct or not. There is also another question raised, *viz.*, that the plaintiffs are not entitled to recover interest in excess of the principal. As regards the question of rate the terms of the bond are quite plain. It says: "I do declare and give out in writing that I shall, without any objection, repay the said amount, principal with interest at the rate of Rs. 1-4 per cent. per mensem, on the 30th Bhadur 1277 Fusli. If I fail to do so on that date as promised, then on the expiration of that date, *i.e.*, from the 1st Assin 1278 Fusli, interest on the said amount of loan at the rate of Rs. 1-8 per cent. per mensem, till the date of repayment, shall be due from me." We are bound to decree the rates agreed upon under s. 2, Act XXVIII of 1855, and there is no ground upon which we can say that this stipulation was in the nature of a penalty. Then as regards the question raised before us, as to whether under the Hindu law the plaintiffs were entitled

* Appeal from Original Decree No. 1 of 1882, against the decree of Baboo Ram Persad, Sub-Judge of Shahabad, dated the 22nd August 1881.

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to recover interest in excess of the principal, we are of opinion that the aforesaid s. 2, Act XXVIII of 1855, is also conclusive upon this point. Our attention has been called to several decisions of the Original Side of this Court and of the Bombay High Court; they were based upon the provisions of the Charter of the late Supreme Court, by which it was provided that the Hindu law was to govern contracts between parties who were Hindus in suits before the Supreme Court. But in the mofussil there was a Regulation, *viz.* Regulation XV of 1793 distinctly providing rules under which interest was to be allowed, and s. 6 of that Regulation provided that in no case interest was to exceed the principal. That section was expressly repealed by Act XXVIII of 1855, and the only section enacted in lieu of s. 6 and other sections repealed was s. 2 of the Act, which says: "In any suit in which interest is recoverable, the amount shall be adjudged or decreed by the Court at the rate (if any) agreed upon by the parties." That being so it is quite clear that we are bound, under s. 2, Act XXVIII of 1855, to award the full interest that is due under the terms of the bond.

The appeal will, therefore, be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Mitter and Mr. Justice Wilkinson.

NAJHAN (DEFENDANT) *v.* MAHOMED TAKI KHAN *alias* PEER BUX KHAN AND ANOTHER (PLAINTIFFS)*

1883 *April* 19.

Civil Procedure Code (Act XIV of 1882), s 244, cl. (c).—Question relating to the execution of the decree—Separate Suit.

In a suit to recover possession of land, the defendants resisted execution on the ground that they were cultivators, and that the decree only authorised the plaintiff to recover possession as proprietor. The objection was overruled, and the defendants were ejected. They then sued to set aside the order made in the execution proceedings and to recover possession.

Held, that the suit was barred under s. 244, cl. (c.), of the Civil Procedure Code.

THIS was a suit to recover ten bighas of jote land in Mulna Chuk. The plaintiffs alleged that it was their mourasi jote; that

* Appeal from Appellate Decree No. 746 of 1882, against the decree of Baboo Poresh Nath Banerjee, First Subordinate Judge of Patna, dated the 27th February 1882, affirming the decree of Baboo Kedar Nath Roy, Additional Munsiff of that District, dated the 30th May 1881.

one Khairat Ali took an izara from Mussamut Latifa, the proprietor, which was to continue until the zuripeshgi was paid; and that on the 7th of July 1855, Khairat Ali sold his izara right to Akbar Khan, and that they held their jote both under Khairat Ali and Akbar Khan. The plaintiffs also alleged that Akbar Khan, on the 21st July 1857, sold his izara right to the wives of the plaintiffs, to whom also they paid rent. The defendant, who afterwards purchased the proprietory rights in Mulna Chuk, sued the present plaintiffs and their wives to recover possession of the disputed land. In that suit the present plaintiffs pleaded that they were mere cultivators, and that their wives were the real purchasers, and their wives admitted having purchased the izara right. On the 11th September 1879, a decree was made for possession in the last mentioned suit. The present plaintiffs resisted execution on the ground that they being cultivators could not be ejected. This objection was disallowed on the 17th of April 1880, and the present plaintiffs were dispossessed. They then instituted the present suit to recover possession and to set aside the order of the 17th April 1880.

Both the lower Courts, holding that the suit was not barred under s. 244 of the Civil Procedure Code, gave the plaintiffs a decree. The defendant appealed to the High Court.

Munshi *Mahomed Yusuf* for the appellant.

Mr. *Twidale* for the respondents.

The judgment of the Court (MITTER and WILKINSON, JJ.) was delivered by

MITTER, J.—We are of opinion that this suit ought to be dismissed as barred under s. 244 of the Civil Procedure Code. The defendant appellant before us brought a suit against the present plaintiffs, and also certain other persons, including the wives of the present plaintiffs, as defendants. That suit was for possession of a piece of land, which includes the disputed land. In that suit the plaintiffs alleged that they were in possession as ryots. The question whether they were entitled to remain in possession of the land as ryots or not, was not gone into, but on the 11th of September 1879 a decree for possession was given in favour of the defendant appellant, and the direction in the decree was that

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the plaintiff in that case, *viz.*, the appellant before us, was to recover possession of the land claimed in the month of Pous 1287. In execution of that decree possession was obtained by the appellant. Thereupon the plaintiffs in this suit appeared as objectors, and contested the right of the appellant before us to eject them from the land now in dispute. Their contention was that the decree awarded to the appellant only the right to recover possession of the property as proprietor, and that it did not extinguish their right as tenants. The matter was gone into, and the Court executing the decree on the 17th April 1880, held that under it the appellant was entitled to recover khas possession of the property by evicting the plaintiffs. Thereupon the present suit was brought to set aside that order and to recover possession of the land in dispute upon the tenant right of the plaintiffs. It appears to us that the question which was decided by the execution Court was a question which came under cl. (c.) of s. 244. That clause is to the following effect: "Any other questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree." Now this question, *viz.*, whether under the decree the defendant appellant was entitled to evict the plaintiffs, was a question which arose between the parties to that suit. There is no dispute as to that. It also appears to us that it was a question relating to the execution of that decree. The contention of the plaintiffs was, that the real effect of that decree was simply to entitle the decree-holder to obtain possession as proprietor. On the other hand the contention of the appellant was that he was entitled under the decree to take khas possession of the property by evicting the plaintiffs in this suit. It was therefore a question relating to the execution of that decree, *viz.*, a question as to the construction of it. The matter which was in dispute falling within cl. (c). s. 244 no separate suit would lie. Section 244 says that the questions enumerated in clauses (a), (b) and (c) shall be determined by order of the Court executing the decree and *not by separate suit.* The plaintiffs, if so advised, might have appealed against the decision of the execution Court, but

they are precluded from maintaining a separate suit by the express words of s. 244.

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We, therefore, set aside the decision of the lower Appellate Court, and dismiss the plaintiffs' suit with costs in all the Courts.

Appeal allowed.

APPELLATE CRIMINAL.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

SHADULLA HOWLADAR AND ANOTHER *v.* THE EMPRESS.*

1883 *May 7.*

Code of Criminal Procedure, (Act X of 1882), s. 309—Trial by Assessors—Evidence—Summing up of Evidence—Delivery of opinions of Assessors—Sessions Judge, Duties of.

The power of summing up the evidence given by s 309 of the new Code of Criminal Procedure, Act X of 1882, is intended to be exercised in long or intricate cases, and the Sessions Judge should confine himself to summing up the evidence and should not obtrude on the assessors his opinion of the worthlessness or otherwise of certain portions of the evidence.

The Sessions Judge should also conform strictly to the words of s. 309, and require *each* assessor to state his opinion orally.

The Sessions Judge should not utilize the services of the pleader for the prosecution for the purpose of recording his summing up to the assessors. If he is not capable of recording the substance of it himself, he should employ an independent person for that purpose.

THIS was an appeal from a conviction and sentence of the Sessions Judge of Furreedpore. The facts of the case are sufficiently set out in the judgment of the High Court.

Baboo *Grija Sunker Mozoomdar* for the appellants.

The Deputy Legal Remembrancer (Mr. *Kilby*) for the Crown.

The judgment of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

PRINSEP, J.—After considering the evidence on the record in this case, we are of opinion that the appellants have been rightly

* Criminal Appeal No. 184 of 1883 against the order of F. J. G. Campbell, Esq., Officiating Sessions Judge of Furreedpore, dated the 12th March 1883.

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convicted under ss. 149 and 304 of the Indian Penal Code. It is clear that they were the ringleaders in a premeditated riot, with the knowledge and intention necessary to bring them within these sections. The mob, of which the appellants were the ringleaders, consisted of about one hundred and twenty-five men, said to have been armed with shields, spears, and clubs. One man was killed, and others were injured.

On these facts we hold that the appellants have been properly convicted, and we also think that the sentences passed on them are not too severe. The appeals are, therefore, dismissed.

It is necessary, however, to make some observations on the procedure adopted by the Sessions Judge. He has taken advantage of the terms of s. 309 of the present Code to sum up the evidence for the prosecution and defence to the assessors. This provision has, for the first time, been introduced into our Code, and in our opinion the object is to enable the Sessions Judge in long or intricate cases to place the evidence in an intelligible form, so as to assist the assessors in arriving at a reasonable conclusion.

In the present case we observe that the Judge seems rather to have taken an opportunity of expressing his opinion in emphatic terms on every single matter put in evidence. He observes on one point: * * * "although you may utterly disbelieve the witnesses, as this Court has done, with regard to those persons (who had been acquitted), but yet *there is no ground for disbelieving them with regard to those men who have been named from the beginning.*"

Now, it is impossible to suppose that the assessors could have been otherwise than very much embarrassed in coming to an independent opinion of their own in the face of the very decided opinion expressed by the Judge. There are other passages in the summing up which might be quoted to a somewhat similar effect.

In the next place we observe that the summing up has been recorded by the pleader for the prosecution and accepted by the Judge as correct. We think that such a course should not have been taken by the Judge, and that if he was incapable himself of recording the heads of the summing up to the assessors, he should

have availed himself of the services of some Court-officer, or directed it to be done by some independent person.

We next find that, instead of taking the opinion of each assessor, as is required by law, the Judge has received the opinions of all the assessors combined, as delivered through one of them whom he thus regards as the foreman of a jury.

We further observe that four other persons, who were under trial along with the appellants, were acquitted by the Sessions Judge at the termination of the evidence for the prosecution. The grounds on which the judgment of acquittal was based are, that the evidence of identification was unworthy of belief.

Under such circumstances it was the duty of the Judge, before passing judgment, himself to ask for and record the opinions of the assessors on that evidence. The Judge, however, has thought it unnecessary to do so, because he considers that there was "no evidence" against the accused, the fact being that there was evidence which the Judge thought unworthy of belief.

Appeal dismissed.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

SHEO SARAN TATO *v.* THE EMPRESS.*

1883 *May 4.*

Sentence—Penal Code (Act XLV of 1860), s. 75—Previous Conviction.

The object of s. 75 of the Indian Penal Code is to provide for an additional sentence, not a less severe sentence, on a second conviction. Recourse should not be had to that section if the punishment for the offence committed is itself sufficient.

THIS was an appeal from the following finding and sentence of the Judge of Shahabad sitting with assessors on the 19th of March 1883:—

"The Court concurring with the assessors finds that the accused person Sheo Saran Tato is guilty as charged, namely, that he on or about the 18th day of February 1883, at Arrah, committed house-breaking by night with intent to commit theft, he having previously, that is to say on the 25th August 1874, been convicted of house-breaking by night in order to the committing of theft, such conviction not having been set aside

* Criminal Appeal No. 207 of 1883, against the order of J. Tweedie, Esq., Sessions Judge of Shahabad, dated the 19th March 1883.

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on appeal, and that he thereby committed an offence under s. 457 of the Indian Penal Code punishable under section 457/75 of the same; and under these sections the Court directs that the said Sheo Saran Tato be punished with rigorous imprisonment, which shall extend to four years from this date."

No one appeared to argue the case.

The judgment of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

PRINSEP, J.—There is no reason for questioning the correctness of the conviction of the appellant, and the sentence is not excessive. The appeal is, therefore, rejected.

We think it necessary, however, to notice a misconception of the object of s. 75, Penal Code, into which the Sessions Judge has fallen. He seems to think that on a second conviction of any of the offences specified in that section he is bound to pass sentence thereunder, and he accordingly observes that, although for the offence committed (s. 457), the prisoner would be liable to imprisonment for fourteen years, he would under s. 75 of the Penal Code, by reason of a previous conviction, be liable to imprisonment for only ten years. He then states that "it is for the prisoner's advantage, provided he is prepared to take his chance of transportation to admit a previous conviction." The object of s. 75 is to provide for an additional sentence, not for a less severe sentence on a second conviction. Recourse should not be had to s. 75 if the punishment for the offence committed is itself sufficient, and even then the Code of Procedure requires that the prisoner should be first convicted of that offence.

Appeal dismissed.

Before Mr. Justice Prinsep and Mr. Justice O'Kinealy.

1883 May 28.

CHAND KHAN v. THE EMPRESS.*

Appeal—Security for good behaviour—Code of Criminal Procedure (Act X of 1882), ss. 110, 118, 123.

No appeal lies to the High Court from an order passed by a District Magistrate under the provisions of s. 123 of the Criminal Procedure Code and on reference by the Magistrate confirmed by the Sessions Judge under the same section, requiring a person to be detained in prison, until he should provide security for his good behaviour.

* Criminal Appeal No. 253 of 1883, against the order of G. A. Grierson, Esq., Officiating Magistrate of Patna, dated the 26th April 1883.

IN this case a rule was issued under s. 110 of the Criminal Procedure Code by the Officiating Magistrate of Patna, calling upon the appellant to show cause why he should not be ordered to provide two good and sufficient securities in Rs. 50 each, and his own recognizance in Rs. 100 to be of good behaviour for three years. On cause shown the rule was made absolute under s. 118 of the Criminal Procedure Code, but the appellant was unable to provide the necessary security. The Magistrate detained him in prison pending the orders of the Sessions Judge. The latter passed the following order: "The respondent, Chand Khan, must give his own recognizance of Rs. 100, and find two securities in Rs. 50 each for three years, as required by the Magistrate whose order is confirmed under s. 123 of the Code of Criminal Procedure. Failure to comply will entail on the respondent rigorous imprisonment not exceeding three years until compliance." Chand Khan appealed to the High Court.

No one appeared to argue the case.

The judgment of the Court (PRINSEP and O'KINEALY, JJ.) was delivered by

PRINSEP, J.—We think that no appeal lies in this case. Section 406 provides expressly for an appeal on behalf of a person required by a Magistrate, other than the District Magistrate or a Presidency Magistrate, to give security for good behaviour, and the law nowhere declares that any appeal shall lie in other cases of this class. The order moreover is not a conviction on a trial held by a Sessions Judge (s. 410), nor a sentence of the District Magistrate subject to the confirmation of the Sessions Judge (s. 408*a*), and, therefore, under s. 404 no appeal would lie.

Appeal dismissed.

ORIGINAL CIVIL.

Before Sir Richard Garth, Knight, Chief Justice and Mr. Justice Cunningham.

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March 18.

THE ORIENTAL BANK CORPORATION *v.* THE BAREE TEA COMPANY, LIMITED.

Principal and Agent—Managing Agent—Authority of Agent—Liability of Principal—Banker and Customer—Bills of Exchange—Indorser and Acceptor.

N. & Co., the Managing Agents of the Baree Tea Company, had a general banking account with the Oriental Bank Corporation, which account they were allowed to overdraw on having the overdraft properly secured. Under the Articles of Association of the Baree Tea Company, *N. & Co.* had power to "draw, accept, endorse, and negotiate on behalf of the Company all such cheques, promissory notes, drafts, &c., as should be necessary for enabling them to carry on the business of the Company." Purporting to act under this power *N. & Co.* drew a bill of exchange on the Managing Agents of the Company, which was accepted by the latter, and endorsed by *N. & Co.* to the Oriental Bank Corporation, who credited the amount to *N. & Co.'s* general account. The amount was drawn out by cheques drawn by *N. & Co.*, personally, without reference to the Baree Tea Company, and there was no proof that the money had been applied for the purposes of the Baree Tea Company.

Held, in an action by the Oriental Bank against the Baree Tea Company, that the latter were not liable on the bills as acceptors.

Two suits were brought by the Oriental Bank Corporation, the indorsees of certain bills of exchange, against the Baree Tea Company, Limited, as acceptors, to recover the amount of the bills. From the evidence it appeared that Nicholls & Co., who (previously to the month of February 1881), carried on the business of Bankers and Agents in Calcutta, had been appointed Managing Agents of the Baree Tea Company in 1874, and as such Managing Agents had power under the Articles of Association to "draw, accept, endorse, and negotiate all such cheques, promissory notes, drafts, &c., as should be necessary for enabling them to carry on the business of the Company."

It appeared that for several years Nicholls & Co. had a general banking account with the Oriental Bank, and in

September 1879 Mr. William Nicholls, the senior partner of the firm of Nicholls & Co., applied to the Manager of the Bank for a loan to the Baree Tea Company. He showed the accounts and the Directors' report of the Tea Company, stated to the Manager that the Company was in need of money to carry on its business, and, producing the Articles of Association, pointed out the passage above quoted, giving the Managing Agents power to accept and draw bills for the purpose of the Company. The Manager agreed to advance the money, and advances were made by discounting bills to the amount required. These advances were paid off by Nicholls & Co. No separate account was opened with the Baree Tea Co., the proceeds of the bills being credited to, and the amounts drawn debited in, the general account of Messrs. Nicholls & Co.

It appeared from the bank books that Messrs. Nicholls & Co. were allowed to overdraw their account on having the overdrafts properly secured, and on the 22nd of April 1880, the amount overdrawn was Rs. 23,560-12-5, which amount was secured by the deposit of Government paper belonging to Nicholls & Co. to the amount of Rs. 26,000. In this state of affairs, on the 22nd of April, Mr. William Nicholls applied to the Manager of the Bank for a loan for the purposes of the Baree Tea Company, Limited. The Manager agreed to give the loan, and the transaction was carried out as follows: A bill of exchange for Rs. 15,000 payable "to us or order" three months after date was drawn by "Nicholls & Co," and directed "to the Managing Agents, Baree Tea Company, Limited, Calcutta." Across the face of the bill was written, "accepted due 22-25th July 1880. Nicholls & Co., Managing Agents, Baree Tea Company, Limited." This bill was endorsed by Nicholls and Co. to the Oriental Bank, was discounted by the Bank at the market rate of the day, and the proceeds Rs. 14,690-15-5 were credited in the general banking account of Messrs. Nicholls and Co. It has been stated above, that before this transaction the debit balance in the deposit ledger of the Bank was Rs. 23,560-12-5. After the transaction the debit balance was stated to be Rs. 8,869-13-0, being the difference between Rs. 23,560-12-5 and Rs. 14,690-15-5. After this date, the 22nd April 1880, the name of the Baree Tea Company did not

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appear in the books of the Bank; and Mr. Harper, the Bank Manager, stated, "the amount was drawn out by cheques by Nicholls and Co. personally, without any reference to the Baree Tea Company." The bill for Rs. 15,000 was never paid; but was renewed from time to time by other bills drawn in a similar form, and finally by the bills the subject-matter of the present suits, which were drawn, accepted and endorsed, on the 5th of February 1881.

The Baree Tea Company denied liability for the amount of the bills; denied the authority of Nicholls & Co. to accept the bills so as to bind the Company; denied that the bills were drawn or accepted for the purposes of the Tea Company; and alleged that the bills, if endorsed, were wrongfully endorsed for the purpose of securing debts of Nicholls & Co. due to the plaintiff Bank, and that the Bank had notice of such wrongful endorsement. The case was tried by Wilson, J., who on the 23rd of May 1882 delivered the following judgment:—

WILSON, J.—The plaintiff Bank in these two cases sues the defendant Company upon certain bills of exchange accepted on behalf of the Company by Nicholls & Co. By the Articles of Association, Art. 6, the Managing Agents, Nicholls and Co. had power "to draw, accept, endorse, and negotiate on behalf of the Company all such cheques, promissory notes, hoondies, drafts, Government and other securities as shall be necessary for enabling them to carry on the business of the Company." The bills in question were accepted by Nicholls & Co. professing to represent the Company, to secure advances which Nicholls & Co. said they required for the purposes of the Company. Several objections were raised to the plaintiff's right to recover, some of which would require grave consideration, if it were necessary to decide upon them. But I do not think it necessary to deal with more than one objection, because that one seems to me to be fatal. If Nicholls & Co. had authority to accept such bills as those sued upon, they could only have a right to do so for the purposes of the Company; but I do not think it is open to the Bank in this case to say that the transaction was anything but a transaction with Nicholls & Co. personally. The consideration for the bills was not an advance to the Company, or indeed any advance at all.

The Bank merely credited Nicholls & Co. in their general account with the amount of each bill, and that account was an overdrawn account, though the overdraft was, no doubt, secured. Suit dismissed with costs.

The plaintiffs appealed.

Mr. *Branson* and Mr. *Hill* for the appellants.

Mr. *Branson*.—The evidence shows that Nicholls & Co. kept the Baree Tea Company going when they were in great difficulties, and it is only fair to presume that the money raised by the Bank was applied for the Company's benefit. The Managing Agents of the Company came to the plaintiffs to ask for an advance on behalf of the Company. They had a clear right to draw and accept bills under the Articles of Association, and the Bank was not bound to see to the application of the money. Mr. Harper's evidence shows clearly that credit was given not to Nicholls & Co. but to the Baree Tea Company. Counsel referred to *Gray* v. *Johnston* (1).

Mr. *Hill* on the same side contended on the evidence that there was no doubt that an advance was made by the Bank, and that that advance was made to the Tea Company and not to Nicholls & Co. The accounts showed that at the time the advance was made the Tea Company were in want of the money. Nicholls & Co. had power to pledge the credit of the Company, and the Bank were satisfied that that was the case. The Bank was not bound to look to the application of the money, nor was it aware that Nicholls & Co. were committing a breach of trust, or a fraud on the Company—see *Gray* v. *Johnston* (1). Even had the account with the Bank been opened in the name of the Tea Company, Nicholls & Co. as Managing Agents could have at once transferred the money to their own account. As to the form of the bills the learned Counsel contended that they were the bills of the Tea Company not of Nicholls & Co.: see the rules of law referred to in Story on Agency, ss. 147 and 154, and *Lindus* v. *Melrose* (2), and that it need not be expressed in words that they were made "by or on behalf of the

(1) L R, 3 H. L, I.

(2) 2 H. & N., 293; S. C. 4 Jur. N. S., 488.

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Company," if there was sufficient to show that they were so made. He also contended that there was an exclusion of personal ability—see *Alexander* v. *Sizer* (1).

Mr. *Pugh* and Mr. *Trevelyan* for the respondents were not called on.

The following judgments were delivered by the Court. (GARTH, C. J., and CUNNINGHAM, J.)

GARTH, C.J.—In these cases I entirely agree with the Court below, and upon the same grounds.

Both suits were brought to recover the amount of certain bills of exchange from the defendants' Company, which bills, it was alleged, had been drawn by Messrs. Nicholls & Co. upon, and accepted by themselves as the defendants' Agents, and endorsed by Nicholls & Co. to the plaintiffs Bank.

Messrs. Nicholls & Co. were undoubtedly the Managing Agents of the defendants Company, and by the Articles of Association they were empowered as such Agents "to draw, accept, endorse, and negotiate on behalf of the Company all such cheques, promissory notes, drafts, &c., as should be necessary for enabling them to carry on the business of the Company."

The bills in question were drawn by Nicholls & Co. upon the Managing Agents of the Baree Tea Company; they were accepted by Nicholls & Co. under the description "Managing Agents of the Baree Tea Company." They were payable to the order of Nicholls & Co., and endorsed by Nicholls & Co. to the plaintiffs Bank.

These bills were given in renewal of certain other bills, which were in a similar form, and the origin of them all was a bill for Rs. 15,000, dated the 22nd of April 1880, drawn, accepted, and endorsed in the same way. The question whether the plaintiffs can succeed in these suits admittedly depends upon whether they could have successfully sued the defendants upon the last mentioned bill.

The defendants take two principal objections to the suit: first they say, that the bills were not accepted in such a form as to bind the defendants; and, secondly, that, as a matter of fact, the

(1) L. R. 4 Ex, 102.

bill for Rs. 15,000 was not drawn or accepted for the purposes of the Company, and that it was not necessary for Nicholls & Co. to accept that bill to enable them to carry on the business of the Company.

I agree with the learned Judge in the Court below, that it is not necessary to consider the first of these points, because I think that upon the plaintiffs' own evidence, the second point should be decided in the defendants' favor.

The question appears to me to be one of fact. Was the bill for Rs. 15,000 drawn and accepted for the purposes of the Company? Or can we say upon the evidence that it was necessary for carrying on the business of the defendants' Company that the bill should have been negociated?

Now the relations between the plaintiffs and Nicholls & Co. at the time when the bill was drawn were as follows: The plaintiffs were the private bankers of Nicholls & Co., who kept a current account there. The plaintiffs were in the habit of allowing Nicholls & Co. to overdraw their account, sometimes to a considerable amount; and the latter had deposited with the plaintiffs Government securities to cover those overdrafts to the amount of Rs. 26,000.

Nicholls & Co. were at this time engaged in a great variety of business transactions, and on the 22nd of April 1880 they had overdrawn their account with the plaintiffs to the amount of Rs. 23,560. A few days previously the balance against them had been Rs. 36,000.

In this state of things Mr. Harper, the Manager of the Bank, tells us that Mr. Nicholls (of the firm of Messrs. Nicholls & Co.) stated to him that his firm wanted money to carry on the Baree Tea Gardens, and that they proposed to do, (what they had done before on more than one occasion) namely, to draw a bill upon themselves as Agents for the defendant Company in the form in which these bills were drawn, and then to accept and endorse it to the Bank. To this Mr. Harper assented, and the bill for Rs. 15,000 was negociated. No money passed between them upon the transaction, but the bill was entered in the usual way in the plaintiffs' bill book, and Nicholls & Co.

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were credited in their current account with the plaintiffs with the amount of the bills, less discount.

It is perfectly true, that after this transaction moneys were from time to time drawn out of the plaintiffs' Bank by Nicholls & Co., which it is probable that the Bank would not have allowed them to draw, but for the fact of the proceeds of this bill having been placed to their credit. But it has not been shewn, that any of these sums were required for or expended upon the defendants' Tea Garden, or were otherwise used for the purposes of the defendants' Company.

The direct and immediate effect of the transaction, as the Bank well knew, was simply this: to reduce the balance due to them by Nicholls & Co. in their private current account by the sum of Rs. 15,000 less discount; and if Nicholls & Co. had failed the next day, as indeed they did not long afterwards, the effect of the transaction would only have been to pay off the private debt to the Bank of Nicholls & Co., and the defendants' Company could have derived from it no benefit whatever.

Even if the Rs. 15,000 had been paid into the hands of Nicholls & Co., instead of being applied by the plaintiffs in discharge of Nicholls & Co.'s private debt to them, I much doubt whether the defendants would be liable to pay the amount of the bills, unless it could be shewn, which it certainly has not been in this suit, that the money was really required for the purposes of the defendants' Company. If the defendants could be fixed with liability to the Bank, by Nicholls and Co. *by merely informing the Bank that they required money for carrying on the defendants' gardens*, it seems to me, that it would have been in the power of Nicholls and Co. to raise any sum of money they pleased upon the defendants' credit, without applying, or intending to apply, a single rupee of it for the defendants' benefit.

I entirely agree with the lower Court that the defendants are not liable upon the bills in question, and I think that these appeals should be dismissed with costs on scale 2.

CUNNINGHAM, J.—I concur in dismissing these appeals. The question on which the case depends is, whether the circumstances under which the bill for Rs. 15,000 was given to the Bank were

such as to entitle the Bank to look to any one but Nicholls and Co. for their satisfaction. I think that the Court below rightly held that the Bank could hold no one but Nicholls and Co. responsible. Nicholls and Co. were in the habit of advancing funds for the Baree Tea Company, of which they were Agents. These advances were made from their general balance at the Oriental Bank, and this balance was kept up by large overdrafts, partially secured, which the Bank allowed Nicholls and Co. to make. It was also kept up by the proceeds of bills, which Nicholls and Co. drew on the Company, and themselves accepted as Agents to the Company. These bills were discounted by the Bank, and the proceeds went to reduce Nicholls and Co.'s overdrawn account. It is true that Mr. Harper says that Mr. Nicholls told him on one occasion when a bill was thus discounted, that the money was required for carrying on the Baree Tea Company, and that his firm had made advances to the Company; and on the occasion when the bill for Rs. 15,000 was given, he said "that he wanted another discount to carry on the Baree Tea Gardens." That, thereupon, the bill was discounted, and the proceeds placed to Nicholls and Co.'s credit; but I do not think that this justifies the Bank in holding the Baree Tea Company responsible, or that a bill so drawn and so employed could be properly regarded as falling within the scope of Article 56 of the Company's Articles. That article empowers the Agents "to draw, accept, endorse, and negotiate on behalf of the Company, all such cheques, promissory notes, hoondies, drafts, Government and other securities as shall be necessary for enabling them to carry on the business of the Company." I do not think that this empowered them to accept bills drawn on the Company with a view that the proceeds should be placed to their general account, and that from that general account advances should be, from time to time, made to the Company. The arrangement had the effect, as my Lord has pointed out, of exposing the Company to lose the entire benefit of the bill in case of Nicholls and Co.'s failing before any further advances were made by them to the Company. Article 56 does not, in my opinion, contemplate any such arrangement, but merely the drawing and accepting of bills in the ordinary transaction of the Company's business.

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The case of *Gray* v. *Johnston* (1), has been much insisted on as justifying the appellant's contention; but that case merely defined the circumstances which will justify a bank in refusing to honor a customer's cheque, that customer being an executor. In fact, Lord Westbury's remarks seem to me to go strongly against the Bank. "It has been very well settled, that if an executor or trustee, who is indebted to a banker, or to another person, having the legal custody of the assets of a trust estate, applies a portion of them in the payment of his own debt to the individual having that custody, the individual receiving the debt has at once not only abundant proof of the breach of trust, but participates in it for his own personal benefit."

In the present instance, when the bill was discounted, the Bank was in custody of funds which Nicholls and Co. held to the Bank's knowledge in trust for the Company; and being so in custody, it received partial payment of its own debt from Nicholls and Co. out of those funds, and thus it seems to me, fell within the scope of Lord Westbury's remarks.

Appeal dismissed.

Attorneys for the appellants: *Messrs. Barrow & Orr.*

Attorneys for the respondents: *Messrs. Harriss & Co.*

APPELLATE CIVIL.

Before Mr. Justice Mitter and Mr. Justice Wilkinson.

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SITANATH KOER AND OTHERS (DEFENDANTS) *v* LAND MORTGAGE BANK OF INDIA (PLAINTIFFS).*

Hindu Law. Alienation—Mitakshara—Mortgage by father—Liability of sons not made parties—Civil Procedure Code (Act XIV of 1882), s. 283.

The *L* Bank advanced money to *C*, a Hindu governed by the Mitakshara school of law upon mortgage of ancestral property. *S*, who was stated to be *C's* only son, joined in the mortgage. Subsequently the Bank obtained a decree against *C* and *S* for the amount due on the mortgage. On attempting to sell the mortgaged property other sons of *C* objected. This objection was allowed, and the mortgagees referred to a regular suit.

* Appeal from Original Decree No. 120 of 1881, against the decree of Baboo Mohendro Nath Bose, Subordinate Judge of Tirhoot, dated the 14th February 1881.

(1) L. R., 3 H. L., 1.

They then sued all the sons of *C* to establish their lien on the mortgaged property.

Held, that the suit was maintainable under s 283 of the Civil Procedure Code.

Nuthoo Lall Chowdhry v. *Shoukee Lall* (1); and *Mussamut Dhaee* v *Hurry Prosad*, (2), distinguished.

THIS was a suit for a declaration that certain property, which had been mortgaged to the plaintiffs, was charged with the plaintiffs' lien, and was liable for the full amount of their claim, and for sale.

It appeared that on the 7th of April 1873 the plaintiff Bank advanced the sum of Rs. 10,000 to one Chundermun Koer, a Hindu governed by the Mitakshara school of law, his son Singheswar Koer joining in the mortgage upon the security of a mouzah called Ababakerpore. The mortgage deed, which was in the English form, contained a recital that the mortgagor was subject to Mitakshara law, and that Singheswar Koer was his only son. On the 13th of June 1873 the plaintiff Bank obtained a decree for the amount of the loan, with interest and costs, making the mortgaged property liable in satisfaction. The Bank then sought to execute the decree by sale of the mortgaged property, but five other sons of Chundermun Koer (in the present suit the defendants 1 to 5) objected to the sale on the ground that as members of the joint family they were equally interested with Chundermun and Singheswar in the ancestral property which had been mortgaged without their consent or permission. This objection was allowed on the 19th of November 1878, the Judge holding that the joint and undivided interest of the sons other than Singheswar was not liable to attachment and sale in execution, and referring the plaintiff Bank to a separate suit to enforce their lien.

The plaintiff Bank now sued all the sons of Chundermun, alleging that they (the plaintiff Bank) were entitled to recover jointly and severally from all the defendants and from the mortgaged property all monies then due, or to become due, under the decree on the following grounds: (1), that the property mortgaged was not family property; (2), because the debt covered by the

(1) 10 B L. R., 200. (2) Unreported.

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mortgage bond and the decree was a proper and valid debt for which Chundermun Koer, the father and manager, could legally pledge the property; (3), because the defendants were the heirs and legal representatives of Chundermun Koer, and had inherited from him property far exceeding in value the amount due to the plaintiff Bank; and (4), because the plaintiff Bank were entitled to protection as *bonâ fide* mortgagees without notice of the claim of the defendants 1 to 5. The defendants pleaded that the suit was barred under ss. 13 and 43 of the Civil Procedure Code. It was proved that before the loan the Manager of the plaintiff Bank had made enquiries as to the family of Chundermun Koer, and that the fact that there were other sons than Singheswar was concealed from him. The Subordinate Judge gave the plaintiff Bank a decree, declaring that the entire mortgaged property was liable to satisfy the debt due to the Bank, and that if it was not sufficient the other properties of the defendants should be liable.

The defendants appealed to the High Court.

Baboo *Mohesh Chunder Chowdhry* and Baboo *Doorga Dass Dutt* for the appellants.

Baboo *Dwarka Nath Mookerjee* and Baboo *Kashi Kant Sen* for the respondents.

The judgment of the Court (MITTER and WILKINSON, JJ.) was delivered by

MITTER, J.—The appellants before us are the five sons of one Chundermun Koer, *viz.*, Silanath Koer, Gopinath Koer, Hera Lall Koer, Hurbuns Narain Koer, and Rughoobuns Narain Koer; and Mussamut Amilbutee Thakooranee, widow of Chundermun Koer, Hurbuns Narain and Rughoobuns Narain Koer are said to be minors. It was also stated in the course of the argument that the first four sons are at present adults, and were also adults on the 7th April 1873, when the mortgage bond, the origin of the present suit, was executed. There is some evidence in support of that statement. The lower Court has not expressed any opinion upon it, but we may take it as a fact proved that they were adults on the 7th April 1873. It appears that this bond

of the 7th April 1873 was executed by Chundermun Koer and his eldest son Singheswar Koer, who was the defendant No. 6 in the lower Court, but who has not joined in the appeal which has been preferred to this Court. In this bond, which was for Rs. 10,000, a property named mouzah Ababakerpore Kowahi was hypothecated as collateral security for the loan. A suit was brought against Chundermun Koer and Singheswar Koer, the executants of the bond, and a decree was obtained on the 10th June 1877. After this decree was passed, Chundermun died. Then the decree-holder applied for the execution of this decree against Singheswar Koer and the appellants, other than the widow of Chundermun, as representatives of the deceased Chundermun. An objection was made that the appellants, other than the widow of Chundermun, were not his legal representatives. Thereupon the decree-holders, the respondents before us, withdrew their application to proceed against the appellants, other than the widow of Chundermun, as the legal representatives of the latter. The mortgaged property having been attached on the 23rd June 1878, a petition was filed by the appellants, who are the sons of Chundermun, to the effect that their interest in the mortgaged property could not be sold, inasmuch as they were not parties to the original mortgage transaction of the 7th April 1873. On the 19th November 1878 the execution Court being of opinion that the objection was valid released their interest in the mortgaged property from attachment, and the present suit was brought by the Land Mortgage Bank of India, the decree-holders in that proceeding, on the 17th of November 1879. They pray that it may be declared that in spite of the objections taken by the defendants Nos. 1 to 5 the entire mortgaged property mentioned above is charged with the plaintiffs' lien, and is liable for the full amount of the plaintiffs' claim under the aforesaid mortgaged bond; and (2), that the defendants Nos. 1 to 6 may be declared by the Court liable to pay severally or jointly with defendants No. 6 all the amount due up to this time, and also the amount which may be due in future to the plaintiff Bank according to the conditions laid down in the decree dated 13th June 1877. There are other prayers in the plaint, but it is not necessary to refer to

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them. The defendants in their written statement allege that the original loan transaction was not for the benefit of the family, and that their shares in the family property were, therefore, not liable for the debt, and for the same reason they alleged that they were not also personally liable. This was their statement on the merits of the plaintiffs' claim, but they urged two objections against the maintenance of the suit: (1), that the present claim was barred under s. 13 of the Procedure Code, there having been already an adjudication of the cause of action upon which the suit was brought; (2), that the claim of the plaintiffs was barred by the law of limitation. The lower Court, overruling all these objections, has awarded a decree in favor of the plaintiffs in these terms: "That the suit be decreed in favor of the plaintiffs, and it being proved that the entire mortgaged property, *i.e.* Mouzah Ababakerpore Kowahi, is ancestral property, the same is liable for Rs. 16,859-13-9, being the amount of decretal money, principal with interest, up to date of suit, and further interest from the date of suit up to the date of realisation under the terms of the decree dated 13th June 1877; and that in case of the entire amount not being realised therefrom, the persons and other property of the defendants shall be held liable for the remaining portion of the debt." Against this decree Singheswar Koer has not appealed, and it must therefore stand as against him. We have no jurisdiction to go into the question whether it was a correct decree against him or not. We have only to deal with the appeal of the appellants before us. It was contended on their behalf that this suit was not maintainable, that it was based upon a cause of action upon which a suit had been brought and disposed of, that there was no separate cause of action upon which this suit has been brought, and that, although it was urged that the appellants were not parties to the suit which was brought upon the bond and decreed on the 13th June 1877, still, if they were jointly liable with the executant of the bond a second suit would not lie against them, the cause of action having been exhausted in the first suit. In support of this contention two cases have been cited before us, *viz.*, the case of *Nuthoo Lall Chowdhry* v. *Shoukee Lall* (1),

(1) 10 B L R, 200.

and the case of *Mussamut Dhaee* v. *Hurry Prosad*, an unreported decision of this Court dated 22nd March 1882. The whole of this contention, it seems to us, is based upon a misapprehension as to the nature of the plaintiffs' claim. We are of opinion that the present suit was maintainable under the provisions of s. 283 of the Civil Procedure Code. It has been already stated that in execution of the decree dated 30th June 1877, the whole of the mortgaged property was attached. Thereupon an objection was preferred by the sons of Chundermun other than Singheswar Koer. That objection (as the execution Court distinctly says) was disposed of under s. 280 of the Code, and it appears to us from the statements made in the petition by which that objection was first preferred that it properly came within the purview of ss. 278 to 282. Now s. 278 says: "If any claim be preferred to, or any objection be made to the attachment of, any property attached in execution of a decree, on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim or objection." In this case their contention was that the property attached in execution of the decree, dated 10th June 1877, was not wholly liable to sale in execution of that decree. Then s. 280 says, after providing for other cases which have no application to the present, that if upon the said investigation the Court is satisfied that, for the reasons stated in the claim or objection, the property attached was in the possession of the judgment-debtor, partly on his own account and partly on account of some other person, the Court shall pass an order for releasing the property wholly, or to such extent as it thinks fit, from attachment. In this case, as we shall presently show from the judgment of the execution Court, it was found that the property attached was partly in the possession of the judgment-debtor and partly in the possession of the claimants—in fact that it was a joint-family property belonging to the father and the son; and the sons being objectors the Court found that it was partly in the possession of the father and partly in that of the sons. Having found that fact the Court released the interest of the sons from attachment under s. 280. That being so the plaintiffs were entitled to bring this suit under s. 283. In order to show

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that this was really the nature of the proceedings in the execution Court, we have only to glance at the points decided by that Court. The proceeding is to be found at page 42 of the paper book. After stating the questions that were to be determined in that proceeding, the Court said: "Whether the act of the father was or not valid is not, however, a question that can be tried in this summary case like the claim preferred under s. 278 of the Procedure Code by third parties to property attached in execution of a decree. "The Court has to try such claim, and see whether the property belongs to such third party, and to release it from attachment and sale if it is found to belong to him and to be in his possession; so upon the objections of the sons of the mortgagor in this case, the Court must see whether the property mortgaged is ancestral and the sons were in conjoint possession, and if they were, whether they should not have the share claimed by them, the extent of which is not disputed, exempted from attachment and sale." Then the learned Subordinate Judge further said: "I cannot enter into the question of the validity, or otherwise, of the mortgage summarily," and so on. After coming to the conclusion that the mortgaged property was in the joint possession of the father and the sons he allowed the claim, and declared that the share claimed was to be exempted from attachment and sale. Then, there is a further declaration at the end of the order to the effect that, "if the decree-holders have any lien on the shares released by virtue of the hypothecation of the said shares having been included in their bond, they must sue to enforce the same by a suit against the objectors." It is, therefore, quite clear that the present suit was brought under s. 283 of the Civil Procedure Code. That being so, the cases cited have no sort of application to the present. In the case of *Nuthoo Lall Chowdhry* v. *Shoukee Lall* (1) the facts were these: A bond was executed by two persons named Domun Lall and Bhowani Pershad in favor of the plaintiffs in that case. In that bond they hypothecated their share of a certain property, and a decree was obtained against Domun and Bhowani Pershad declaring

(1) 10 B. L R 200

their shares in the hypothecated property to be liable for the satisfaction of the mortgage debt. In execution of that decree their shares were brought to sale, and a part of the money decreed was realised. These facts are thus stated by Chief Justice Couch in his judgment. It appears that the plaintiffs executed that decree, *viz.*, the decree which they obtained against Domun and Bhowani Pershad, "and according to the statement in the plaint in the present suit, they sold the right and interest of the two persons named in it, still, in the execution of the decree, treating it as an instrument which had pledged the shares of those two. They recovered the sum of Rs. 7,435, and now, instituting a suit on the 3rd of December 1870, they say: "Since the decree was not against all the defendants, the whole of the mortgaged property in which the second party defendants held a share, was not put up to sale, but the fact is, that there being community of interest, the loan was taken, and mortgage concluded alike by all defendants; hence all of them are jointly liable to your petitioners, and the entire property ought to be held liable." In that case, therefore, the plaintiffs having obtained a decree by which the shares of the two persons who were the executants of the bond were rendered liable, and having, in execution of that decree sold these shares, brought a second suit for the purpose of extending the operation of that decree on the ground that the original loan that was taken by Domun and Bhowani Pershad was taken not on behalf of themselves only, but on behalf of themselves and the remaining members of the joint Hindu family of which they are the members. It was held that such a suit would not lie, and that conclusion was arrived at upon the ground that either the original bond was executed by these two persons alone, or that it was executed by these two persons as managers of the joint family; if executed by these two alone no suit would lie against the others; if executed by them as managers then all the other members were liable jointly, but the creditors having elected to sue some of the joint-debtors only, were not entitled to bring another suit against those left out in the first suit. That is not the nature of the present suit. It is not the sole object of this suit to make the appellants before us liable on the original cause of action. So far as the

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plaint contains a prayer to that effect, it is no doubt liable to objection; but so far as it is a suit to have it declared that the mortgaged property is liable to be sold in execution of the plaintiff's decree, it comes under s. 283. That section says: The party against whom an order under s. 280, 281, or 282 is passed, may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive. Here the decree-holders have brought this suit to establish the right that they are entitled to sell the mortgaged property in execution of the decree they have already obtained upon the original cause of action. Therefore the decision in *Nuthoo Lall Chowdhry* v. *Shoukee Lall* is not applicable to the facts of the present case. The other case cited is entirely based upon the decision in the case of *Nuthoo Lall Chowdhry* v. *Shoukee Lall.* It may be observed, however, that in this last case the learned Judges make this observation: "We do not wish to be understood to hold that in a suit properly brought the mortgagee cannot obtain an order from the Court declaring that as a son in a Mitakshara family, a person in the position of the defendant might not be liable for debts lawfully incurred by his father. That is not, as we understand it, the present case and the nature of the claim now made. The original mortgage bond, we observe, is not on the record, but so far as we can gather from the terms of the plaint and from the counter-objection made by the decree-holder in execution of his decree, we learn that the mortgagee throughout regarded this transaction as being one in which the father alone was concerned, and in which he sought to obtain payment of his debt out of property which belonged exclusively to the father." This observation at once shows that this case is clearly distinguishable from the present. We are, therefore, of opinion that so far as this is a suit under s. 283 it is not barred as *res judicata.* That being our view upon the question of *res judicata* the question of limitation as a matter of course falls to the ground, for the limitation laid down in respect of suits under s. 283 is one year from the date of the order, and the present suit was admittedly brought within that period. Therefore, we need not discuss the questions that have been raised in this appeal, *viz.*,

whether this was a suit to enforce the original mortgage lien, or to make the defendants liable for money had to their use. The next question is, whether under s. 283 the plaintiffs in this case have established their right to have the whole of the mortgaged property sold in execution of the decree obtained against the appellant's father, and the solution of this question depends upon the solution of another, *viz.*, whether or not the original mortgage bond of 1873 is binding upon the sons. It has been already stated that four of these appellants were adults at the time when this bond was executed. Several cases have been cited before us in order to establish this proposition of law, *viz.*, that where there are adult sons, the father, even in case of necessity, has no right, without the concurrence of these sons, to deal with the ancestral property. So far as this proposition goes it has been well established by decided cases, and we are bound to hold that the adult sons are not concluded by a transaction to which they are not parties, unless their assent to it, express or implied, is proved. It may be mentioned here that one of the questions at issue between the parties was, whether the mortgaged property was ancestral or not. The plaintiffs stated that it was the self-acquired property of Chundermun. The lower Court has found against the plaintiffs upon this point, and there is no appeal against that part of the judgment. We must, therefore, take it that it was ancestral. But having regard to the circumstances, to which we shall presently refer, it seems to us that, although there was no express consent by the sons, there was clear evidence of implied consent on their part to the transaction of 1873. (His Lordship then considered the evidence as to this point and continued). We consequently come to the conclusion that the mortgage of the 7th April 1873 was a valid transaction binding upon the whole of the family. The widow has no *locus standi* in the case, unless a partition of the family property be decreed. Therefore, we need not take any notice of the widow, so far as the question of consent is concerned. The plaintiffs have established their right to sell the mortgaged property. That being so, so far as the lower Court's decree declares that right it is correct; but then that decree goes further and declares that all the defendants are personally liable. It does

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not appear to us upon what ground that part of the decree is based. That part of the decree must, therefore, be set aside. Although we set aside that part of the decree of the lower Court, having regard to the unjustified opposition on the part of the appellants, we think that they ought to be made liable for the costs of the plaintiffs. The plaintiffs' suit will, therefore, be decreed in the manner stated above against all the defendants with costs in both Courts.

Appeal allowed.

Before Mr. Justice Cunningham and Mr. Justice Maclean.

1883 *April* 10.

KASHI NATH DÀSS AND ANOTHER (DEFENDANTS) *v.* HURRIHUR MOOKERJEE (PLAINTIFF).*

Evidence Act (I of 1872), s. 92.—Evidence contradicting Document—Mortgage—Conditional Sale.

It does not necessarily follow from s. 92 of the Evidence Act that subsequent conduct and surrounding circumstances may not be given in evidence for the purpose of showing that what on the face of it is a conveyance is really a mortgage. This rule turns on the fraud which is involved in the conduct of the person who is really a mortgagee, and who sets himself up as an absolute purchaser, and the rule of admitting evidence for the purpose of defeating this fraud would not apply to an innocent purchaser without notice of the existence of the mortgage, who merely bought from a person who was in possession of title deeds and was the ostensible owner of the property.

THIS was a suit to establish the plaintiff's right to certain land. The plaintiff alleged that the defendant Kashi Nath Dass had conveyed the land in question to the second defendant Jadu Nath Dass, from whom the plaintiff purchased. The defendant Kashi Nath Dass pleaded that the deed executed by him in favour of Jadu Nath Dass, though it purported to be a kobala, was in fact a deed of conditional sale. At the hearing the Munsiff refused to admit evidence to show that the transaction between Kashi Nath and Jadu Nath was really a mortgage

* Appeal from Appellate Decree No. 2280 of 1881, against the decree of Baboo Radha Kishna Sen, Additional Sub-Judge of Hooghly, dated the 5th September 1881, affirming the decree of P. M. Banuerjee, Munsiff of Howrah, dated the 30th September 1880.

and not a sale, considering that such evidence was inadmissible under s. 92 of the Evidence Act, and gave the plaintiff a decree. The Subordinate Judge took the same view and confirmed the Munsiff's judgment.

The defendants appealed to the High Court.

Baboo *Rash Behary Ghose* and Baboo *Jogesh Chunder Banerjee* for the appellants.

Baboo *Gopal Lall Mitter* for the respondent.

The judgment of the Court (CUNNINGHAM and MACLEAN, JJ.) was delivered by

CUNNINGHAM, J.—The point raised in this appeal is that the Court below was in error in holding that the defendant was not entitled to plead, nor was the evidence tendered by him admissible to show that the document mentioned in the plaint as a deed of purchase was only a security for money. There has been some wavering of opinion at different periods among the Courts in this country as to the law of evidence on this point. The law for some periods was laid down, so far as concerned this Court, by the Full Bench Ruling in *Kashi Nath Chatterjee* v. *Chandi Charan Banerjee* (1), in which it was held that, though evidence of a contemporaneous oral agreement was inadmissible to show that a document purporting to be an absolute conveyance was only a mortgage, yet that evidence might be given of the facts of the case, and of the subsequent conduct of the parties in order to show that this was the case.

After the passing of the Evidence Act it was held by some learned Judges of this Court that the Full Bench Ruling was no longer a correct exposition of the law. That view, however, was called in question in a decision of the Bombay High Court, *Baksu Lakshman* v. *Govinda Kanji* (2), in which case the learned Judges held, with reference to the doctrine prevalent in the English Courts as to fraud, that on this ground it was open to the parties to a document, and those who claimed under them, to show by subsequent conduct and by various circumstances of the case that the

(1) B. L. R. Sup. Vol., 383: 5 W. R., 68.

(2) I. L. R., 4 Bom., 594.

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document was not a conveyance but was a mortgage. This view has subsequently been accepted by the Chief Justice of this Court and Mitter, J., in *Ilem Chunder Soor* v. *Kally Churn Das* (1), in which case the Chief Justice laid down the same doctrine as was affirmed in the Full Bench Ruling in *Kashi Nath Chatterjee* v. *Chandi Charan Banerjee* (2) as being still the correct exposition of the law, and in which he expressed his general concurrence in the views of the Bombay High Court, as expressed in *Baksu Lakshman* v. *Govinda Kanji* (3).

We think, therefore, that the decision of the Court below in this case must be set aside; and that it does not necessarily follow from s. 92 of the Indian Evidence Act that subsequent conduct and surrounding circumstances may not be given in evidence for the purpose of showing that what on the face of it is a conveyance is really a mortgage.

In applying this doctrine, however, it must be recollected that the rule turns on the fraud which is involved in the conduct of the person who is really a mortgagee, and who sets himself up as an absolute purchaser; and that the rule of admitting evidence for the purpose of defeating this fraud would not apply to an innocent purchaser without notice of the existence of the mortgage, who merely bought from a person who was in possession of the title deeds and was the ostensible owner of the property.

We must, therefore, set aside the decision of the lower Appellate Court and remand the case to the learned Judge for trial with reference to the above observations and the ruling of this Court and the Bombay High Court on the subject.

Costs to abide the result.

Appeal allowed and Case remanded.

(1) *Ante* p. 528.

(2) B. L. R. Sup. Vol., 383: 5 W. R., 68.

(3) I. L. R., 4 Bom., 594.

ORIGINAL CIVIL.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Cunningham.

G. STEPHEN (ONE OF THE DEFENDANTS) *v.* C. N. STEPHEN (PLAINTIFF).

1883 *March 3.*

Act XL of 1858, *s.* 3—*Minor—Certificate of Administration—Majority—Majority Act (IX of* 1875,) *s.* 3.

A certificate of guardianship under Act XL of 1858 takes effect not from the date when it is applied for, nor when an order granting it is passed, but from the date when it is actually issued. Therefore where an application for a certificate was made in 1877, and an order granting it was passed in December 1879, but the certificate was not issued until December 1881, *Held*, that the minor, in respect of whose property the certificate was applied for, who had between the date of the application and the issue of the certificate attained the age of 18 years, and signed a promissory note, was not entitled to take advantage of s. 3 of the Majority Act 1875, and set up the plea of minority as a defence to a suit on the note.

THIS was an appeal from a decision of Wilson, J., dated the 28th of March 1882. The suit was brought to recover the amount due on a promissory note executed on the 27th October 1880 by the appellant, together with two other persons. The appellant was born on the 7th of April 1861. In 1877 his father applied to the Dacca Court for a certificate of administration to his property, under s. 3 of Act XL of 1858. On the 10th December 1879 the Judge made an order granting the certificate; but it was not issued until the 10th of December 1881 which was the date it bore.

The only question in this appeal was whether the plaintiff was or was not a minor at the time he executed the note. Wilson, J., held that he was not then a minor. The judgment is reported in I. L. R., 8 Calc., 714.

Mr. *T. A. Apcar* for the appellant. The decision of this question depends on the date from which a certificate granted under Act XL of 1858 takes effect. If it can be said to take effect from the date it is applied for, the appellant, instead of attaining his majority at 18, would come under the provisions of s. 3 of the Majority Act 1875, and would be a minor until he was 21; but if it only has effect from the date of the order granting it, or from the date it

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is issued, then the appellant was no doubt of age when this note was signed. The learned Judge in the Court below seems to have been under the impression that the appellant attained the age of 18 years between the date of the order granting the certificate and its actual issue, but that was not so; he attained the age of 18 years before the order granting the certificate. My contention is, however, that the certificate when granted is to be taken as dating back to the time of the application for it, as being the time at which the applicant may be said to have a right to it. Pending the application, therefore, it is submitted he would remain a minor for all purposes. The case of *Chunee Mul Johary* v. *Brojo Nath Roy Chowdhry* (1), was referred to.

Mr. *Trevelyan* for the respondent contended, that the mere fact that an application for a certificate was pending could not alter the period at which the minor would attain majority. The appellant ceased to be a minor when he attained 18, and after that the issue of a certificate would not be of any effect so as to make the Majority Act applicable to him, and so alter his status from one of majority to one of minority. The case of *Monsoor Ali* v. *Ramdyal* (2) was referred to as to the effect of s. 26 of Act XL of 1858, and also Wilberforce on Statutes 48, and Maxwell on Statutes 73, to show that express words would be needed to take away vested rights.

Mr. *Apcar* in reply.

The judgment of the Court (GARTH, C.J., and CUNNINGHAM, J.) was delivered by

GARTH, C.J.—The defendant No. 3 is the sole appellant in this case, and the only ground of appeal is, that at the time when the promissory note was given he, the defendant No. 3, was a minor.

The facts were these: The defendant No. 1 is the father of the defendant No. 3, and it appears that in September 1877, before the defendant No. 3 had attained the age of 18 years, the defendant No. 1 petitioned the District Judge of Dacca for a certificate of administration (under s. 3 of the Minor's Act XL of 1858) to the property of the defendant No. 3.

(1) I. L. R., 8 Calc., 967. (2) 3 W. R., 50.

On the 10th of December 1879 the Judge made an order for a certificate of administration under that Act, and on the 10th December 1881 the certificate was issued.

But meanwhile, between September 1877 and the 10th of December 1879, when the Judge made the order, the defendant No. 3 had attained the age of 18 years; and the note in question was given on the 27th of October 1880, before the certificate was issued.

In this state of things the learned Judge in the Court below has held that the defendant No. 3 could not avail himself of the defence of minority; and I think he was right.

Section 3 of Act XL of 1858 enables any person who claims a right to have charge of the property of a minor under a will or deed to apply to the Civil Court for a certificate of administration. Section 11 provides that, "whenever a Court shall grant a certificate of administration to the estate of a minor, it shall at the same time appoint a guardian to take charge of the person and maintenance of the minor;" and s. 18 further provides that "every person to whom a certificate shall have been granted under the provisions of this Act, may exercise the same powers in the management of the estate as might have been exercised by the proprietor if not a minor."

Then by s. 3 of the Indian Majority Act IX of 1875, it is enacted that "every minor of whose person or property a guardian has been or shall be appointed by any Court of Justice shall be deemed to have attained his majority when he shall have completed his age of 21 years and not before."

The question is, whether by the combined operation of the provisions of these two Acts, the defendant No. 3, at the time when he signed the note in question, was under the disability of minority.

In my opinion he was not.

In the first place I think that until the certificate has been actually issued the estate of the minor does not vest in the person who obtains the certificate, and if after the time when the minor comes of age, that is to say, attains the age of 18 years, and before the certificate is granted he enters into any contract, I consider that he is bound by such contract whether the certificate had been previously applied for or not.

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If this were not so, it seems to me that persons dealing with the minor after he had attained his full age would be placed in a most unfair position.

Suppose a certificate to be applied for on the 1st of January 1880, and that before the application is heard, say on the 1st February following, the minor attains his full age of 18. He enters upon the possession and management of his property, sells portions of it to *bonâ fide* purchasers, mortgages other portions, and has various dealings with various people who know perfectly well that he is of age, and have every reason to believe that they are at liberty to contract with him.

For some reason or other the application is not heard or the certificate granted (as in this case) for a year afterwards. Are all the minor's sales and other dealings to be avoided at his option or that of his guardian? It seems to me, that if that were the law, it would give rise to much injustice, and might frequently be made an instrument of fraud.

When a minor comes of age, and is entitled by law to take possession of and manage his property, the public have a right to deal and contract with him, and I see no reason why those contracts and dealings should be avoided, merely because the Court may afterwards appoint a guardian of his person or property.

Moreover I very much doubt whether the provisions of s. 3 of Act IX of 1875 were ever intended to apply to those cases, where a minor has actually attained his majority, before any certificate under Act XL has been granted. I think the language of the Act shews, that it is only intended to apply in cases where the person and property of the minor have been placed under the care of a guardian before he has attained his full age. If he has once attained that age, I am disposed to think that the provisions of the Act are not intended to have a retrospective effect, and to restore a person to the status of a minor, who has once attained his majority.

I, therefore, agree with the learned Judge of the Court below and consider that this appeal should be dismissed with costs on scale 2.

Appeal dismissed.

Attorney for the Appellant: Mr. *Hume.*

Attorney for the Respondent: Baboo *O. C. Gangooly.*

APPELLATE CIVIL.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Macpherson.

DEBENDRA NATH SHAW AND ANOTHER (DEFENDANTS) v. AUBHOY CHURN BAGCHI (PLAINTIFF).*

1883 *May* 14.

Appeal—Arbitration, Reference to—Award—Decree confirming award.

Where an award, *i.e.*, a legal award has been made, and judgment is passed in accordance therewith, the judgment is final; but where a question arises whether the award is a legal award or not, an appeal lies from a judgment of a Court passed in accordance with such award.

A case was referred to the arbitration of five persons, with a proviso that in the event of any two of the arbitrators being absent, the arbitration should be continued by the other three. Two of the arbitrators named were the pleaders on either side, and these two with the consent of the parties ceased to act as arbitrators, but argued the matter before the other arbitrators. *Held* that the award made by the other three arbitrators named was a valid award.

THE plaintiff sued to recover Rs. 1,850 from the defendants, alleging that the defendants had forcibly taken and retained Rs. 1,000, which he (the plaintiff) had intended to invest in the purchase of jute, and that he, through his inability to purchase the jute suffered a loss of Rs. 850.

The defendants denied having forcibly taken the money, but alleged that the plaintiff's servant had deposited it with them in satisfaction of a debt owing to them by the plaintiff.

After hearing the plaintiff's evidence, the matter was referred to the arbitration of five persons, the agreement providing that in the event of any two of the arbitrators named being absent, the arbitration should be continued by the remaining three.

Amongst the arbitrators named were the pleaders engaged by the parties; they, however, withdrew with the consent of the parties, and did not sit as arbitrators, but argued the case before the arbitrators.

* Appeal from Appellate Decree No. 415 of 1882, against the decree of C. A. Kelly, Esq., Judge of Pubna, dated the 24th February 1882, reversing the decree of Baboo Jibun Kristo Chatterjee, Sub-Judge of that District and Bogra, dated the 23rd August 1880.

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On the 9th August 1880, the arbitrators filed their award, the decision being in favor of the defendants. The plaintiff objected to the award, but the Subordinate Judge confirmed it.

The plaintiff appealed to the District Judge, who found that the award had only been signed by three of the arbitrators, and held that as the proviso regarding the absence of any of the arbitrators had not been complied with, inasmuch as the pleaders were present at the arbitration, and no steps had been taken under s. 510 of the Code to supply the place of the two pleaders, the appeal would lie, and reversed the order of the Subordinate Judge under s. 562.

The defendants appealed to the High Court.

Baboo *Kali Mohun Das* for the appellants contended that no appeal would lie from the award, and that the lower Court had no jurisdiction to set aside the decree of the first Court, except on one of the grounds mentioned in s. 521 of the Civil Procedure Code.

Baboo *Mohiny Mohun Roy* for the respondent.

The following judgments were delivered by the Court (GARTH, C.J., and MACPHERSON, J.)

GARTH, C.J.—I have had some doubt whether we have any right to entertain this appeal; but after considering the authorities, I think an appeal lies.

It is not easy (as observed by Jackson, J.), to ascertain precisely what was the decision of the Full Bench in the case of *Sashti Charan Chatterjee* v. *Tarak Chandra Chatterjee* (1), but it seems to me that the majority of the Judges at least decided this; that when an award has been made and judgment is given by the first Court in accordance with that award, the judgment is final—(see s. 325 of the old Code, corresponding with s. 522 of the present Code), but that when there is no award, that is *no legal award*, then the judgment of the first Court is open to appeal. It seems to follow from this, that when the question is, whether the award is a legal award or not, an appeal lies from the judgment.

And that, as it seems to me, is the case here. The question

(1) 8 B. L. R., 315.

raised is, whether the three arbitrators under the circumstances had any power to make an award, or, in other words, whether the award which they made is a valid one. The first Court determined that it was valid, and gave judgment accordingly for the defendant No. 1; but the plaintiff appealed to the District Judge upon the question of the validity of the award, and he has reversed the decision of the Munsiff, and declared the award invalid.

As he has decided this on a point of law, the defendant No. 1 comes to this Court on second appeal, and I think he has a right to do so. It now appears, that the question between the parties is this: The case was referred to the arbitration of five persons, but with a proviso that in case two of the arbitrators should be absent, the other three might make the award.

Now what occurred was this: Two of the arbitrators, it appears, were the pleaders on either side; and it was considered that as these gentlemen had acted as advocates, they could not with propriety act as arbitrators, so they ceased, (apparently with the consent of both parties), to act as arbitrators, and acted, as they had done before, as advocates on either side.

It seems to me, that this was virtually absenting themselves from their post as arbitrators; and as this was done apparently with the concurrence of the parties, I consider that the award made by the remaining three arbitrators was valid.

I think, therefore, that the decree of the lower Court should be reversed, and that of the Subordinate Judge restored with costs to the plaintiff in both Courts.

MACPHERSON, J.—I concur in decreeing this appeal. I much doubt whether the Judge was right in entertaining the appeal; as however he did entertain it, he was I think clearly wrong in holding the award to be invalid.

The reference clearly contemplated a decision by three out of the five arbitrators, if two were unable to attend. Two of them took no part in the arbitration with apparently the concurrence of the parties. I see no ground for holding the award to be invalid.

Appeal allowed.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Macpherson.

1883. *April* 27.

SURNOMOYEE (PLAINTIFF) *v.* DENONATH GIR SUNNYASEE AND OTHERS (DEFENDANTS.)*

Landlord and Tenant—Settlement with tenant containing a clause of re-entry—Compensation in lieu of rent—Trespassers.

The plaintiff made a settlement of certain land with *A* and *B* for five years, there being in the settlement a stipulation that if the tenants failed to pay rent the plaintiff might accept another tenant.

A died during the tenancy, and *B* left the place and the property without paying rent, and thereupon the plaintiff entered into possession of the property and held khas possession of it for two years, when he in 1870 entered into a settlement of it with defendant No. 1 for six years.

In 1878 *B* died, and defendants Nos. 2 and 3 alleging themselves to be the chela and dasiputra of *B* took upon themselves to collect rent from the tenants.

The plaintiff thereupon brought a suit against the three defendants, treating them as trespassers, but at the same time asked for the amount of rent due and for eviction.

Held, that defendants Nos 2 and 3 had no right on the property at all, and that defendant No. 1, who might have been considered as holding over after the expiration of his lease, if he had been in actual sole possession, should not be made liable for the whole rent when defendants Nos. 2 and 3 were in possession as much as he was, but that as the plaintiff had elected to waive the trespass, all the defendants might, on the authority of *Runee Lalun Monee* v. *Sona Monee Dabee* (1), and *Luckhee Kant Dass Chowdhry* v. *Sumeeruddi Lusker* (2), be treated as tenants, and a decree for use and occupation given against them.

THIS was a suit for rent and for ejectment. The plaintiff stated that the jotes for which rent was claimed were in their nature "sarasari" or temporary, and that they were held originally by Ramdyal and Rajendra Gir Sunnyasee, who were the registered tenants; that the kabuliat contained a stipulation that if the tenants should fail to pay rent, then the zemindar might accept another tenant in their place and take rent from him; that Ramdyal died in

* Appeal from Original Decree No. 288 of 1881, against the decree of Baboo Bhugoban Chunder Chakrabarthi, Subordinate Judge of Rungpore, dated the 29th December 1880.

(1) 22 W. R., 334. (2) 13 B. L. R., 243 : 21 W. R. 208.

1275 (1868), and after his death his brother Rajendra left the village without occupying the jotes, or paying rent to the plaintiff; and that in consequence of this relinquishment the plaintiff had entered into and had held khas possession till the year 1277 (1870). That on the 4th Pous 1277 (19th December 1870) the plaintiff entered into a settlement of these jotes for a term of five years, with the defendant No. 1, Denonath Gir Sunnyasee, the settlement containing a stipulation, that if the tenant should fail to pay rent, then the zemindar might put another tenant in possession and realize rent from him; that the defendant No. 1 in 1283 (1876) was not on good terms with his under-tenants, and had been unable to obtain payment of rent, and that the plaintiff had been compelled to bring suits against them, and had realized some of the arrears; that Rajendra died in 1285 (1878), and since his death the defendant No. 2, Raj Chundra Gir Sunnyasee, who alleged that he was a chela of Rajendra, and defendant No. 3, professing to be his dasi-putra, collected rents from the tenants.

The plaintiff therefore deemed them trespassers, as they had made no settlement with her nor had paid her any rent, and were alleged to have no transferable interest or mokurari right in the jotes, and brought this suit praying (1) for the amount of rent due, (2) for the eviction of the defendants, and (3) that the decree be given against the defendant No. 1, or against all the defendants or any one of them, and for other relief.

The defendant No. 1 contended that the jotes were transferable, and that he was in possession.

The defendant No. 2 contended that the jotes were mourasi mokurari and transferable, that he was the chela of Rajendra, and had obtained a certificate under Act XXVII of 1860 to collect his debts, and that he was in possession; that Rajendra did not relinquish and had obtained decrees for rent of his under-tenants.

The defendant No. 3 contended that, as Rajendra had a permanent right and interest in the jotes, his heirs, the minors in possession, could not be evicted, and that the prayers of the plaint were contradictory in their nature, and that the suits were no *bonâ fide* rent-suits.

The Subordinate Judge found that the defendant No. 2 was the tenant in possession in Rajendra's right as being his chela, and

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that Rajendra's rights had never terminated, the tenure being transferable; that according to a custom the tenure had descended from each Gossami to his chela, and gave a decree for rent against him; and that the onus was on the plaintiff to show that the holders of the jotes were liable to eviction, and that she had failed in this.

The plaintiff appealed to the High Court.

Baboo *Sreenath Doss*, Baboo *Gooroo Das Banerjee* and Baboo *Ganendra Nath Dass*, for the appellant.

No one appeared for the respondents.

The judgment of the Court (GARTH, C.J., and MACPHERSON, J.) was delivered by

GARTH, C.J.—This is a suit brought by the plaintiff, a zemindar, against three sets of defendants. Her claim is twofold (1st), for rent, cesses, and interest, amounting altogether to upwards of Rs. 5,000; and (2nd), for khas possession of the property in respect of which the rent is claimed.

The history of the case is this. Previously to the year 1870 the property, which is the subject of the suit, was held by a person named Rajendra Gir Gossami. He, and his predecessors before him who belonged to some religious order, had held the property in question, under settlements made from time to time with the zemindar, and the last of these settlements, made with Rajendra Gir, dated the 26th of Choitro 1267 (9th April 1861), was for a term of five years, from the commencement of 1268 (13th April 1861) to the end of 1272, (12th April 1866) at an annual rent of Rs. 674-0-1. In that settlement there was a provision to this effect: "If failing to pay the rent of the said jote, instalment per instalment (as it should be demanded), we allow the same to fall into arrear, then you will take out of our hand the said jote, put another tenant in possession, and have the rent realized from him."

Then it appears from the evidence, that in the year 1868 Rajendra Gir, in consequence of what he considered a disgrace attaching to him, left the place and the property, without making any arrangement with regard to the payment of his rent; and he never paid any rent afterwards. He remained away for two or

three years, and when he came back, he never made any attempt to resume possession of the jote, nor did he pay any rent to the zemindar.

The consequence was, that the zemindar, finding the property deserted, entered upon it under the provision in the lease and realized the rents directly from the ryots for some time, till at length he made a fresh settlement of the property with the defendant No. 1, who took it at an advanced rent of Rs. 975 a year. He held it at that rent for six years, (which was the term of the lease), and it then seems very difficult to say who really was in possession. The defendant No. 1 says that he was; but the other defendants, each claiming under Rajendra Gir, laid claim to and asserted their right and possession, the defendant No. 2 being Rajendra's principal chela, and the defendant No. 3 his eldest son by a concubine. Each of these defendants laid claim to the interest which Rajendra had previously possessed.

So far as we can gather from the evidence, there has been a struggle ever since between these three defendants. One or other of them has been obtaining rents (as they could collect them) from the different ryots, and it is very difficult to say which of them has been really in possession; but this is certain, that between them these three persons have been setting the zemindar at defiance, and have entered into no agreement with her for payment of rent.

In this state of facts the lower Court has come to a decision which we cannot uphold. The Subordinate Judge has decided that the defendant No. 2, who is the chela of Rajendra, is the tenant in possession of the property in Rajendra's right; and that Rajendra's interest never in point of fact came to an end. From the fact of Rajendra and his predecessors in title having been in possession of the tenure for a great many years, and of its being a transferable tenure, he considers it to be of a permanent character. He further holds that by custom the tenure has descended from each succeeding Gossami to his chela; and he finds that the defendant No. 2, as being the chela of Rajendra, became entitled, upon Rajendra's death,

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which occurred in the year 1878, to the interest which Rajendra had in the property.

He then finds that Raj Chundra, the defendant No. 2, is rightfully in possession as Rajendra's successor, and that he is entitled to hold at the old rent which Rajendra paid; and he gives the plaintiff a decree for rent at the old rate for the period in respect of which the claim is made.

We think it impossible to uphold this finding, because whatever was the true nature of Rajendra's tenancy, we think that the zemindar put an end to it in accordance with the clause of re-entry in the lease.

The clause in the lease which I have just read provides that if the rent of the jote falls into arrear, the zemindar is to be at liberty to re-enter upon the property, and put any other tenant in possession, and realize rent from him.

Now, considering that Rajendra actually deserted the property, left the neighbourhood for upwards of two years, and never afterwards paid any rent, it seems to us impossible to say, that the zemindar was not at liberty to take advantage of this clause in the lease, and to re-enter upon the property.

He did re-enter, and he did hold khas possession for some time, receiving rent from the occupying ryots. He then granted a lease of it to the defendant No. 1 at an increased rent. That seems to us to have put an end to Rajendra's interest, and to have effectually debarred Rajendra's chela or son from any right to it in the future.

That being so, we find the state of things to be this: That during the time for which the plaintiff seeks to recover rent in this suit, the defendants Nos. 1, 2, and 3 were all more or less in possession of the property without any right to it; consequently they were all trespassers. The defendants Nos. 2 and 3 had no right there at all, and the defendant No. 1, who might have been considered as holding on after the expiration of his lease, if he had been in actual possession, can hardly be made liable for rent upon that footing, when the other defendants were in possession as much as he was. They are, therefore, all trespassers upon the property.

Then the difficulty is, what relief the plaintiff is entitled to in

this suit. She sues all the defendants for rent, and for ejectment. We may, no doubt, treat the defendants as trespassers and eject them, but then we can give the plaintiff no mesne profits.

If the plaintiff had sued for mesne profits as well as for khas possession, we could have given her a decree; but she has not asked for mesne profits; and we should have great difficulty in giving her mesne profits after the commencement of this suit, because we do not know who has been in possession since that time.

But the learned pleader for the appellant contends that, although none of the defendants are liable for any definite amount of rent, we are at liberty, in accordance with certain decisions to which our attention has been called, to give the plaintiff a fair compensation for the use and occupation of the land; and that the plaintiff is entitled to this against all three defendants, who have all been in joint possession of the property.

One case to which he has referred us in support of this view is in *Ranee Lalun Monee* v. *Sona Monee Dabee* (1). That was a case where there was a difficulty in giving the plaintiff a decree for rent, properly so called; but the Court thought the plaintiff entitled to some compensation from the defendants for the use of the land, and the case was sent back to the lower Court to ascertain the amount. Mr. Justice Jackson, in giving judgment, says: "If these parties (meaning the defendants) are in possession, they make themselves tenants by use and occupation of the land."

The other was a Full Bench case *of Lukhee Kant Dass Chowdhry* v. *Sumeeruddi Lusker* (2). There the landlord sued a ryot for rent alleged to be due under a kabuliat, but when the case came to trial, the plaintiff was unable to prove the kabuliat. Then the question arose, whether, as the defendant had occupied the land under the zemindar, the latter was entitled to recover some rent or compensation for the use of the land, the amount to be ascertained by the Court; and the Judges held that he was so entitled, and that the case should be remanded to the lower Court to ascertain the proper amount.

(1) 22 W R, 334 (2) 13 B L R, 243 21 W R., 20

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As the plaintiff is willing in this case to waive the trespass and to treat the defendants as her tenants, we think that upon the authority of these cases we may give the plaintiff a decree for use and occupation. It is a difficult thing to say what amount we should give. Properly speaking, we ought to have further evidence upon that point, but having regard to the evidence already before the Court, we think we may safely give the plaintiff as against all the defendants the same sum which the lower Court has awarded against the defendant No. 2; and we also give the same sum which the lower Court has given for interest upon the amount decreed as from the commencement of the suit.

We are, of course, not in a position to give the plaintiff a decree for ejectment. We could only have given her such a decree if she had elected to treat the defendants as trespassers; as she has elected to treat them as tenants, she can only put an end to their tenancy by a notice to quit. She cannot treat them as tenants and trespassers in the same suit.

The plaintiff will have her costs in this Court from all the defendants.

Appeal allowed.

Before Sir Richard Garth, Knight, Chief Justice, and Mr Justice Macpherson.

1883 *May 7.*

ROOKMINY BULLUB ROY (PLAINTIFF) *v.* MULK JAMANIA BEGUM (DEFENDANT)*

Nawab Nazim's Debts Act (XVII of 1873,) s 11—Agreement for appropriation of payments—Contract Act (IX of 1872), s 60—Account

So far as the Nawab Nazim's Debts' Act is concerned, rent due by the Nawab is on the same footing as any other debt incurred by him, and before his property can be made liable to satisfy such rent debt, the consent of the Governor-General in Council must first be obtained to the issue of execution

THIS was a suit for rent for the year 1284 (1877) and part of the year 1285 (1878).

*Appeal from Appellate Decree No 336 of 1882 against the decree of A J R Bainbridge, Esq., Judge of Moorshedabad, dated the 5th January 1882, affirming the decree of Baboo Mohendra Nath Mitter, Acting Sub Judge of that district, dated the 1st July 1881

The plaintiff stated that her mother formerly was in possession of the mehal, and that whilst so in possession the Nawab Nazim of Bengal took a patni settlement of the mehal on the 6th Pous 1265 (21st December 1858); that the rents fell into arrear, and the patni right was put up to sale, and was purchased by the Nawab in the name of one Joy Sunker Roy; that the Nawab by a deed of gift made over his rights to his wife (the defendant in the suit). That on the death of his mother the plaintiff took possession of the said mehal on the 21st February 1881, and brought this present suit against the defendant (the wife of the Nawab) for rent for the year 1284 and part of the year 1285.

At the hearing the plaintiff and defendant agreed that the question was one of account, and in consequence the pleader of the plaintiff drew up an account, which was agreed to by the defendant, subject to one item of Rs. 390, which was in deposit in the office of the Agent to the Governor-General, which the defendant contended was paid as Government revenue to save the mehal from sale, the plaintiff contending that he was at liberty to appropriate it to the discharge of the rent for 1283 (1876), which otherwise was barred by limitation.

The defendant further contended that the suit would not lie, having regard to s. 11 of the Nawab Nazim's Act of 1873.

The Subordinate Judge found that the plaintiff was not at liberty to claim the sum of Rs. 390 towards payment of the rent for 1283, and that s. 11 of the Nawab Nazim's Act of 1873 was no bar to the plaintiff bringing a suit against the Nawab's wife; all that could be contended being that in execution of the decree no writ or process could be issued against the taluk, and he therefore gave the plaintiff a decree for rent for the years 1284 and 1285, ordering that execution should not issue against the taluk, until the consent of the Governor-General in Council should be obtained.

The plaintiff appealed to the High Court.

Baboo *Mohiny Mohun Roy* (with him Baboo *Bama Churn Banerjee*) for the appellant contended that he was entitled to apply the payments made by the plaintiff to the liquidation of the earliest debt due to the plaintiff, which he would be entitled to do under s. 60 of the

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Contract Act, because the plaintiff's pleader had consented to make an account in accordance with the suggestion of the Court; and that the Court below was wrong in holding that the tenure itself was not liable to be put up for sale for its own arrears, and had erred in its construction of the Nawab Nazim's Act XVII of 1873.

Baboo *Jugdanund Mookerjee* and Baboo *Guru Das Banerjee* for the respondents contended that the Nawab's Act was not intended to apply to rent debts, but to debts of a different nature.

The judgment of the Court (GARTH, C.J., and MACPHERSON, J.) was delivered by

GARTH, C.J.—This suit was brought by the plaintiff, a zemindar, against the wife of the Nawab Nazim of Bengal, for rent of a patni for the year 1284 and part of the year 1285.

The defendant holds the patni under a grant from the Nawab Nazim, and for the purposes of this suit is in the same position as the Nawab himself would be.

The question between the parties turned out to be a matter of account; and in determining that question one point, which was raised by the plaintiff, was, that certain sums, which were admittedly paid by the defendant to the Government for revenue in the year 1284, and which the plaintiff ought to have paid himself, ought to be considered *as payments made by the defendant to the plaintiff*, and as such might be appropriated by the plaintiff in discharge of the rent of the year 1283, which otherwise was barred by limitation. The plaintiff in this suit did not claim any rent for the year 1283.

The Subordinate Judge was of opinion that the plaintiff had no right to appropriate these sums towards payment of the rent of 1283; and he therefore directed the parties to try and settle an account between themselves of the debits and credits for the years 1284 and 1285, excluding from the account the rent of 1283. The result was that the parties virtually came to an agreement, (except as to a sum which is now not in question,) and the Subordinate Judge made a decree accordingly in favour of the plaintiff for Rs. 1,359-9-11.

That decree was appealed to the District Judge, and he seems to have considered that, as the parties had agreed to

the account in the Court below, he ought not to interfere; so he dismissed the appeal with costs.

I should mention, however, that another point was raised in the Courts below, which I shall deal with presently, namely, as to how far Act XVII of 1873, which is called the "Nawab Nazim's Debts' Act," applies in this suit for the purpose of protecting the tenure, in respect of which rent is claimed, from being sold in execution.

The main point which has been pressed upon us in this appeal by the learned pleader for the plaintiff is, that the Subordinate Judge was wrong in holding that the payments of revenue which were made by the defendant for the plaintiff in the year 1284 were not payments to the plaintiff in such suit, as to give the latter a right to appropriate them to the discharge of the rent of 1283 under ss. 59 to 61 of the Indian Contract Act.

These sections merely enact the English law with regard to the appropriation of payments; and it is contended that if the payments of revenue made by the defendant to the Government can be considered as payments made to the zemindar, the plaintiff has a right to appropriate them to the discharge of the rent of 1283, and that in the absence of any specific appropriation they would naturally under s. 61 be appropriated to the payment of the earlier arrears of rent.

Now, assuming that we could consider these payments as made to the zemindar, I am not prepared to say that the appellant would not be right in his contention; but it seems to us impossible to consider them in that light. They are in reality the proper subject of set-off. They are payments made by the defendant to the Government, because the plaintiff would not pay them himself. They were made for the purpose of preventing the property being sold, and they were, therefore, moneys paid for the use of the plaintiff, and recoverable as such against him by the defendant. These sections, therefore, of the Contract Act, with regard to the appropriation of payments, are not applicable to the case at all.

The learned pleader for the appellant then argues that, if they are the subject of set-off, it is wrong to allow them to be used

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by the defendant in this suit, because, at the commencement of this suit, they were not *moneys legally recoverable against the plaintiff*. (See s. 111 of the Civil Procedure Code.)

We think, however, that s. 111 was never intended to enact any new law as to what is, or is not, the subject of set-off. It merely means to lay down rules as to the way in which subjects of set-off can be made available. That being so it seems to us that we have nothing further to decide; because, subject to the correctness of the point which was decided by the Subordinate Judge, it seems clear that the parties agreed to the account, which was the basis of the judgment of the lower Courts. Both the lower Courts evidently considered that to be so.

The other point raised in the case related rather to the execution of the decree than to the decree itself.

It was contended on behalf of the plaintiff that he is entitled to proceed to sell this tenure, which is part of the property of the Nawab Nazim of Bengal, in the ordinary course of execution; and that he is not bound in that respect by the provisions of Act XVII of 1873.

The 11th section of the Act, to which we have been referred, provides that "no suit shall be commenced or prosecuted, and no writ or process shall at any time be sued for against the person or property of the said Nawab Nazim, unless such suit be commenced, or such writ or process be sued for, with the consent of the Governor-General in Council first had and obtained;" and "any suit which at any time shall have been, or shall be commenced, and any writ or process which at any time shall have been or shall be sued for, against the person or property of the said Nawab Nazim, shall be of no effect, unless and until the consent of the Governor-General in Council certified in manner aforesaid is obtained."

The contention of the defendant is that, having regard to this section, the plaintiff has no right to execute his decree in this suit against the property in question without the consent of the Governor-General in Council.

On the other hand, the plaintiff contends that this section has no application to a case of this kind; because this is a suit for

rent, and the Act was not intended to apply to debts for rent but to debts of a different nature.

It seems to us, however, that this is just one of those cases in which the Legislature intended to protect the property of the Nawab Nazim. These two taluks formed part of his estates; and it was for the purpose of protecting those estates and of preventing their sale, that this Act was passed. A debt for rent is like any other debt; and we quite agree with the lower Courts that the consent of the Governor-General in Council will be necessary before the plaintiff can sell the property in execution. This appeal will, therefore, be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Cunningham and Mr Justice Maclean.

KUNNOCK CHUNDER MOOKERJEE (DEFENDANT) *v.* GURU DASS BISWAS (PLAINTIFF).*

1883 *May* 31.

Civil Procedure Code (Act XIV of 1882), *ss.* 42, 43 —*Enhancement of rent, Suit for—Subsequent suit for rent.*

Under ss. 42 and 43 of the Civil Procedure Code, plaintiffs must bring their entire claim and every remedy enforceable in respect of that claim into Court at once, and if they fail to do that in any suit, they cannot afterwards avail themselves of any remedy on which they have not chosen to insist in the first suit. Suits for enhanced rent, and suits for rent, are claims arising in respect of the same subject-matter, and a plaintiff cannot be allowed, after having unsuccessfully sued for rent at an enhanced rate, to sue for the original rent for previous years.

Baboo *Bama Churn Bannerjee* for the appellant.

Baboo *Sree Nath Dass* for the respondent.

The judgment of the Court was delivered by

CUNNINGHAM, J.—The question raised in this appeal is whether the plaintiff, having sued for enhanced rent for the year 1286 (1879), can now sue for the original rent for the years 1284, 1285 and 1286 (1877, 1878, and 1879).

* Appeal from Appellate Decree No. 944 of 1882, against the decree of W. Macpherson, Esq., Judge of the 24-Pergunnas, dated the 10th March 1882, modifying the decree of Baboo Grish Chunder Chatterjee, Second Moonsiff of Satkheera, dated the 30th June 1881.

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The lower Appellate Court has found that the one action is no bar to the other. We feel it impossible to concur in this opinion. It appears to us that, looking at the wording of ss. 42 and 43 of the Code of Civil Procedure, it is clearly the intention of the Legislature that plaintiffs should bring their entire claim and every remedy enforceable in respect of that claim into Court at once, and that if they fail to do that in any suit, they cannot afterwards avail themselves of any other remedy on which they have not chosen to insist in the first suit.

It is true that the Privy Council have pointed out that a suit for enhanced rent and a suit for rent are very different proceedings. None the less are they, in our opinion, remedies or claims arising in respect of the same subject-matter. This being so, we think they fall within the purview of s. 43, and that the plaintiff, not having chosen to put forward this claim for rent of the years 1284, 1285 and 1286 at the original rate in the former suit, is now barred from suing for that rent in the present suit. We think, therefore, that the decision of the lower Appellate Court must be set aside and that the suit must be dismissed with costs throughout.

Appeal allowed.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Mitter

1883 *June 5.*

SHUMBHOO NATH PODDAR (PLAINTIFF) v. LUCKYNATH DEY AND OTHERS (DEFENDANTS).*

Sale in execution of decree—Civil Procedure Code (Act X of 1877), s. 295—Rateable distribution amongst decree holders

Where property belonging to *A* has been attached under a decree, and other decree-holders than the attaching creditor have applied before realization of assets to participate in the sale proceeds, and amongst them a creditor who has obtained a decree against *A* and *B*, such latter creditor is entitled under s. 295 to share in the proceeds of the sale of *A's* property

THIS case was originally filed and decided in 1880, and the regular and special appeal thereon decided on the 30th May 1881 and 19th July 1882 respectively. The case then came up on appeal

* Appeal under s 15 of the Letters Patent against the decree of Mr Justice Field, dated the 19th July 1882, in appeal from Appellate Decree No. 1508 of 1881.

under the Letters Patent, and the question arising in the appeal, so far as is sufficient for the purposes of this report, is set out in the judgment of Garth, C.J.

Baboo *Grish Chunder Chowdhry* for appellant.

Munshi *Serajul Islam* for the respondents.

The following judgments were delivered :—

GARTH, C.J.—This was a Letters Patent Appeal from a decision of Mr. Justice Field, confirming the judgments of both the lower Courts. The question depends upon what is the proper construction to be put upon s. 295 of the Civil Procedure Code.

The appeal was heard some time ago; but it stood over for a time, until Mr. Justice Field and myself had decided a case (second appeal No. 211 of 1882) which was supposed to involve a somewhat similar question under s. 246 of the Code.

That case has now been decided (1), but the decision will not much assist us in the solution of the present question, which is this: whether, when assets have been realized by sale or otherwise in execution of a decree, and more persons than one have prior to the realization applied to the Court, by which such assets are held, for execution of decrees for money *against the same judgment-debtor*, the assets are to be divided among such persons, although the decrees under which they claim may not have been obtained against the same persons.

To put the question, as it was put by Mr. Justice Field in the Court below: Suppose that there were one decree against A, and another decree against A and B, and that the decree-holders in both cases had applied for execution against A, but that execution had been taken out and assets realized in one case only, would the decree-holders under both decrees be entitled to a rateable share of the assets; or, in other words, is that a case which would come within s. 295? I think that this question should be answered in the affirmative. It is clear that, as a matter of justice, the decree-holder in the one case has as much right to take out execution against A, as the decree-holder in the other case; and the evident object of the

(1) *Hury Doyal Guho* v. *Din Doyal Guho*, *ante*, *p.* 479.

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Legislature is to prevent any one decree-holder obtaining an undue advantage over another, when they have both applied for and are both entitled to execution against the same person.

It cannot matter under such circumstances that one decree-holder has a right to proceed against other judgment-debtors, and that the other decree-holder has not. So long as execution may be taken out by both against one and the same judgment-debtor, it cannot signify against what other judgment-debtors the decrees may have been obtained.

I think, therefore, that the judgments of the Court below should be reversed, and that the plaintiff should be declared entitled to a rateable division of the sale proceeds with the defendants. The plaintiff will have his costs in all the Courts.

MITTER, J.—I am also of the same opinion.

There cannot be the slightest doubt, that the governing intention of the Legislature in s. 295 is that there should be an equitable distribution of the assets realized by the sale of a judgment-debtor's property, amongst such of his judgment-creditors as have been diligent enough to apply for execution against him before the realization.

The present case falls within this intention, but the lower Courts are of opinion that it does not come within the language used by the Legislature; they think that the words "the same judgment-debtors" are governed by the word "*decrees*," and that therefore *all* the judgment-debtors must be common in all the decrees. But that this is not the correct construction of the section appears from the fourth clause of its last proviso. There can be no question that the fourth clause covers *all* cases of the sale of immovable property which are covered by the main portion of the section. The word "*same*" does not occur here, and it is evident that the words "*the judgment-debtors*" here refer to the judgment-debtor whose immovable property has been sold in execution of a decree. Similarly the words "*the same judgment-debtor*" in the first portion of the section refer to the judgment-debtor or the judgment-debtors, whose property has been sold in execution of a decree.

Appeal allowed.

ORIGINAL CIVIL.

Before Mr. Justice Pigot.

KHAJAH ASSENOOLLA JOO *v.* KHAJAH ABDOOL AZIZ AND OTHERS.

1883
July 23.

Practice—Civil Procedure Code (Act XIV of 1882) *s.* 136—*Non-compliance with order for production of Documents—Defence struck out.*

Where a defendant neglects to comply with an order for production and inspection, the Court will, although in the last resort, order his defence to be struck out,

THIS was a suit praying that the first defendant might be ordered to bring into Court probate of an alleged will of one Khajah Golam Moheeooddeen (deceased) to try the factum and validity thereof, and for a declaration that the plaintiff was entitled to a share in the estate of the deceased and for an injunction.

The defendant entered appearance and filed his written statement on the 11th December 1882. On the 8th January 1883 the usual order for production of documents was made, and the same was served on the 12th January on the defendant's attorneys.

The defendant on the 18th January filed his affidavit verifying a list of documents in his possession. The plaintiff experiencing difficulty in obtaining proper inspection of the books produced, moved the Court, and on the 29th March 1883 obtained an order directing the defendant to produce and leave at the office of the Registrar within a certain period certain books and documents, amongst which were certain books in Cashmere relating to the years 1270 to 1277 (1863 to 1870), the plaintiff to have liberty to inspect and peruse the same.

The above order was served personally on the defendant as well as on his attorneys on the 27th April. On the 30th May the defendant produced certain books from Umritsur, and made them over to the Registrar, but the plaintiff was unable to obtain inspection of the same owing to the continued absence of the defendant. After a prolonged correspondence between the plaintiff's and defendant's attorneys on the matter, the former received on the 2nd July a letter from the latter saying that "you can inspect the Umritsur books in the Registry Office whenever you chose

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to make an appointment to do so; our client's inspection must be dispensed with." The Registrar, however, would not allow inspection until the defendant should have made a list of the documents. The defendant altogether failed to comply with the order of the 29th March, as regards the Cashmere books, the time for such production having long passed

The plaintiff therefore applied to the Mr. Justice Norris in Chambers for a summons on the 17th July 1883, calling upon the defendant to appear in Chambers on the 20th July to show cause why he should not, within 48 hours from the order, comply with the order of the 29th March 1883 by leaving and producing the Cashmere books at the Registrar's Office, and why in default of his compliance therewith his defence should not be struck off.

The above summons was duly served on the defendant's attorneys, but the defendant put in no appearance as directed by the summons.

Thereupon the plaintiff applied in Chambers for an order in terms of the summons, and Mr. Justice Norris adjourned the matter into Court.

Mr. *Hill* for the plaintiff applied under s. 136 of the Code of Civil Procedure that the defendant's defence might be struck out, stating that he was not aware that any similar application had ever been made in this Court; the section was taken from the English Order XXXI, rule No. 20 of the Judicature Act, and having regard to the serious consequences to the defendant the Court would necessarily be reluctant to exercise the discretion conferred on it, except in extreme cases; see *Twycroft* v. *Grant* (1), in which Lush, J., held that he would only exercise the powers conferred by the rule in the last resort; there, however, an explanation was offered for the non-compliance with the order, and it was said that the defendant was willing to answer the interrogatories within a week, whereas upon the affidavit now before the Court the defendant's whereabouts was unknown even to his attorney, and the latter was wholly uninstructed.

In England the party against whom such an order is made would, it seems, be entitled to come in and ask that the order

(1) W N. for 1875. p. 201.

might be set aside on showing sufficient grounds for such an application; and in this case the order will not be very prejudicial to the defendant.

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PIGOT, J., made an order striking out the defence of Khajah Abdool Aziz under s. 136 of the Code in consequence of his non-compliance with the order of the 29th March 1883; and at the same time mentioned that the party against whom the order was made might come in and seek to set it aside on showing good grounds for the application.

Attorneys for the plaintiff: *Messrs. Remfry and Remfry.*

APPELLATE CIVIL.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Macpherson.

JUGUT SHOBHUN CHUNDER *alias* DOOLAL CHUNDER DEHINGUR GOSSAMY (PLAINTIFF) *v* BINAUD CHUNDER *alias* SODA SHOBHUN CHUNDER DEHINGUR GOSSAMY AND ANOTHER (DEFENDANTS).*

1883 *May* 29.

Jurisdiction of Revenue Courts—Question of Title—Registration of names—Declaratory decrees, Suit for.

It is not the province of a Revenue Court to decide questions of title between contending claimants, such questions being within the province of the Civil Courts. It is the duty of the latter in suits brought for declaration of a right to registration to declare the rights of parties in order that the revenue authorities may be duly certified as to the persons whom they ought to register.

IN this case the plaintiff sued to get his name registered on the revenue rolls as a joint holder with his brother, defendant No. 1 in respect of 311 bighas of ancestral lands.

The plaintiff stated that after his father's death in 1277 (1870), he and his brother, defendant No. 1, inherited their father's estate; that at that time both of them were minors, and the lands in

* Appeal from Appellate Decree No. 1883 of 1881 against the decree of W E Ward, Esq., Judge of Assam Valley District, dated the 12th June 1881, reversing the decree of Baboo Shibo Persad Chuckerbutty, Sudder Munsiff of Gauhatty, dated the 14th December 1880

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question were recorded in the name of their step-mother; that after the death of their step-mother, defendant No. 1, who had attained majority, became the guardian of his minor brother, and applied for and obtained a certificate to collect and receive the amounts due to their father, and further applied to the Collector to have his name registered in respect of his father's ancestral property, and accordingly obtained a pottah in his own name of all these properties; that on the 25th Pous 1285 (10th January 1879) he (the plaintiff) attained his majority, and separated from defendant No. 1, and took ijmali possession of a share of the lands in suit. That defendant No. 1, in order to establish his exclusive right over all the ancestral property, brought a suit against certain tenants to eject them from their holdings; that he the plaintiff thereupon applied to the Revenue Court to have his name recorded as a joint holder of these lands with his brother, but his application was refused both in the first Court and on appeal in the Chief Commissioner's Court: and that he thereupon brought this suit against defendant No. 1 and the Deputy Commissioner for declaration of his title and the recording of his name jointly with that of his brother on the revenue rolls.

Defendant No. 1 stated that the plaintiff was not in possession, and that a suit for a declaratory decree would not lie; and he further denied plaintiff's claim to any portion of the land, the land not being subject to the ordinary Hindu law of inheritance.

Defendant No. 2 stated that he had no interest in the suit and asked for costs.

The Assistant Commissioner found that the lands were ancestral; that the plaintiff had been in possession of the land in suit jointly with his brother, and decided the case in favor of the plaintiff, ordering that the properties claimed by the plaintiff be declared his paternal properties, and he be entitled to get his name registered in respect of a half share therein.

The defendant No. 1 appealed to the Judge of the Valley District of Assam, who, without going into the merits of the case, dismissed the appeal on the ground that the plaint disclosed no cause of action, stating that the plaintiff, being in possession and enjoyment of the lands in suit, the Chief Commissioner's order refusing to register his name as a joint holder with his brother threw no

cloud upon the plaintiff's title; and further that the Court had not the power to pass such an order against the revenue authorities as was asked for in the plaint.

The plaintiff appealed to the High Court.

Baboo *Bhoobun Mohun Dass* for the appellant.

Baboo *Rash Behari Ghose* for the respondents.

The judgment of the Court (GARTH, C.J., and MACPHERSON, J.) was delivered by

GARTH, C.J.—In this case, which is somewhat similar in its nature to others which have been appealed from the Assam Valley Districts, we are sorry to find that the District Judge has again taken an erroneous view of the law.

The plaintiff sued to have it declared that he is entitled to an eight-anna share in certain immovable property, and to have his name registered as the owner of that share in the Revenue Court.

His case is, that his father was the owner of the property in question, and that he and his brother, the defendant No. 1, inherited it in equal shares. At the time of his father's death, which occurred on the 2nd of Joisto 1277 (17th May 1870), the plaintiff and his brother were both minors, and consequently their step-mother, Chunder Coomary, who appears to have acted as their guardian, had her name recorded in the Revenue Court as the owner of one portion of the property, whilst another portion remained in the name of the plaintiff's father, to whom a pottah had been granted.

Chunder Coomary died whilst the plaintiff was still a minor, but his brother, the defendant No. 1, had then attained majority, and he became the plaintiff's guardian after the step-mother's death.

He then applied to the Judge's Court for a certificate authorizing him to collect the amounts due to their father; and taking advantage of his position as the plaintiff's guardian, he also applied to the Collector to have his name recorded as the sole owner of the property, which stood in the names of Chunder Coomary and of his father. His application was granted, and he obtained a pottah, conveying the property to himself alone.

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The plaintiff then says that afterwards upon attaining his majority, he separated from his brother, the defendant No. 1, on the 25th of Pous 1285 (10th January 1879); and that he has since been in ijmali possession of a share of the lands in suit.

He then alleges that the defendant No. 1, with a view of excluding him from his interest in those lands, took proceedings in his own name to eject the tenants; whereupon the plaintiff, for his own protection, applied to the Revenue Court to have his name registered as the owner of an eight-anna share in the property; but in consequence of objections raised by the defendant No. 1 the Deputy Commissioner refused to register him.

He then appealed to the Commissioner, who confirmed the order, but advised the plaintiff to bring a civil suit. This was no doubt his proper remedy; and he did bring this suit on the 2nd of July 1880. The defendant No. 1 alleges (amongst other things) that the plaintiff has no interest in the lands in suit.

The Assistant Commissioner, after going into the case very carefully, decided in the plaintiff's favor, and gave him a decree, declaring that he was entitled to an eight-anna share of a part of the property in question, and to have his name registered as the owner of that share.

The defendant No. 1 appealed from that decree; and the District Judge, apparently without going into the evidence, or considering the judgment of the first Court, held that the plaint disclosed no cause of action, and refused to try the appeal upon its merits.

The District Judge goes on to say, what of course is very true in a literal sense, that the Civil Court has no power to make a binding order upon the revenue authorities in the manner prayed for in the plaint; but I think if he had only exercised a little of the discretion, which was shown by the first Court, he would have had no difficulty in making such a decree as would have given the plaintiff all the relief which he could properly ask, if after an investigation on the merits he considered him entitled to it; that is to say, a decree declaring what his rights were, leaving it to the revenue authorities to register him, if they thought fit, in respect of those rights.

Suits of this kind are extremely useful, and of every-day

occurrence in this province. It no doubt sometimes happens that plaintiffs, through ignorance or mistake, ask for an order upon the Collector, which the Civil Courts have no power to make; but that is a mere formal error, which it is the duty of the Judge to correct; and if he finds upon the evidence that the plaintiff is entitled to the right which he claims, and that the case is one in which a declaratory decree can legally be made, he ought to make such a decree, and then leave it to the revenue authorities to do their duty in the matter.

I observe the District Judge says, that "the revenue authorities in Assam are not legally bound to register the names of all the joint shareholders in a pottah."

I can only say that if this is so, and if the revenue authorities in Assam are at liberty to prefer the claims of any one shareholder in a property, and to register him as the sole owner, to the exclusion of the others, notwithstanding any declaration which may be made by the Civil Court to the contrary, I am afraid that the Revenue Court, instead of being of any service to the public, must of necessity often become an instrument of fraud and oppression; and if that is the state of the law in Assam, I think the sooner the notice of the Supreme Government is called to it, the better.

It is not, of course, the province of the Revenue Court to decide questions of title between contending claimants. It has neither the knowledge of law, nor the proper machinery, to decide such questions. That is obviously the province of the Civil Courts; and their duty, as I understand it, is to declare the rights of parties, in order that the revenue authorities may be duly certified as to the person whom they ought to register.

Unless this were so, I see no reason why the Collector or the Commissioner in Assam should constantly refer parties, (as the Commissioner has done in the present instance), to the Civil Court. It would seem nothing short of mockery to refer a claimant to the Civil Court, and when he has sued there, and had his rights declared, to inform him that the Revenue Court cannot recognize those rights.

The plaintiff in this case has sufficiently explained his title upon the face of his plaint. He has shown how those rights are

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likely to be jeopardized by the exclusive claim to the property which is made by his brother, and the proceedings which the latter has taken with a view to exclude him from his property. It is obvious from the written statement of the defendant No. 1, and from the judgment of the first Court, that the latter denies the plaintiff's title, and means to oust him if he can, and the case is therefore one which comes directly within the scope of s. 42 of the Specific Relief Act.

The case must therefore be remanded to the lower Appellate Court, in order that the merits of the case may be properly investigated, and the plaintiff's rights declared with a view to registration.

There is nothing in the case referred to by the District Judge which is opposed to this view, because in that case, as explained by the High Court, the plaintiff was not in a position to sue for a declaratory decree.

There have been several other cases since the year 1879, which have came up in appeal from Assam, and in which, I regret to say, this Court has been constrained to express its disapproval of the law which has been laid down by the District Judge. (See *Kalindri Dabia* v. *Komola Kanto Surma* (1); *Hootaboo Ravah* v. *Loom Ravah* (2); *Beejoy Keot* v. *Goria Keot* (3); *Purnamal Deka Kohta* v. *Mayaram Deka Kohta*; and (4) *Shiboram Surma* v. *Juggeram Surma* (5).

The costs in this Court and in the lower Appellate Court will abide the result.

Case remanded.

(1) I. L. R., 7 Calc., 437
(2) Id., 440.
(3) Id., 439.
(4) 10 C. L. R., 201.
(5) No. 138 of 1881 not reported

FULL BENCH.

Before Sir Richard Garth, Knight, Chief Justice, Mr. Justice Mitter, Mr. Justice Macdonell, Mr. Justice Prinsep, and Mr. Justice Tottenham.

THE MAHARAJAH OF BURDWAN AND OTHERS (DEFENDANTS) *v.* KRISTO KAMINI DASI (PLAINTIFF.)*

1883 *August* 14.

Sale for arrears of rent—Reg. VIII of 1819, *s.* 8—*Due publication of Notice of Sale.*

Where there is a cutcheri upon the land of a defaulting patnidar the notice required by s. 8 of Reg. VIII of 1819 must be served there; but where there is no such cutcheri, the notice should be published, in the manner required by the section, at the principal town or village within the taluk.

THIS was a reference by GARTH, C.J., and MACPHERSON, J., to a Full Bench. The referring order was as follows:—

This suit was brought to set aside the sale of a patni taluk under Regulation VIII of 1819; and one of the grounds relied upon by the plaintiff was, that notice of the sale had not been duly published.

The question was, whether there had been a sufficient compliance with the provision of s. 8, which requires that "a copy of the notice shall be sent to be similarly published at the cutcheri or at the principal town or village upon the land of the defaulter."

The patni taluk in question was called Lot Amarpur; and as the defaulting patnidar had other properties in the neighbourhood of that taluk, he had a small mal cutcheri on the land of this taluk, and another dihi cutcheri at a village called Mahanad, some eight or nine miles distant from the confines of Lot Amarpur.

At this latter cutcheri his principal business was transacted, including that of Lot Amarpur, and it appeared that two durpatnidars, who were the largest tenants on Lot Amarpur, were always in the habit of paying their rents at the dihi cutcheri.

The other cutcheri within the taluk was used for the purpose of receiving the rents of the smaller tenants, which, when received, were paid into the dihi cutcheri at Mahanad.

* Full Bench Reference No 82 of 1882, from the original decision of the Subordinate Judge of Hooghly, dated 3rd December 1881.

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The notice in this case was taken to the Mahanad cutcheri, and the serving peon gave it into the hands of one of the amlas at that cutcheri in the presence of the defaulting patnidar and obtained a receipt.

It was contended by the plaintiff, who is a co-sharer to the extent of eight annas in the patni, that this service was bad.

1*st*.—Because the cutcheri at Amarpur was the one at which the zemindar was bound to serve the notice; and

2*ndly*.—Because it was delivered to one of the amlas, instead of being stuck up on the wall of the cutcheri.

As regards the first point, it was held in the case of *Mungazee Chaprassee* v. *Shibo Sunduree* (1), that the cutcheri at which the notice should be served need not be within the patni as long as it was adjacent to it and upon the land of the defaulter—See also to the same effect *Lotfonissa* v. *Kowar Ram Chunder* (2), and *Gouree Lall Singh* v. *Joodhisteer Hajrah* (3), where the service of the notice appears to have been effected at the house of the defaulter.

We entertain some doubt, whether, so long as there is a cutcheri or a town or village of the defaulter upon the land of the taluk, the service of the notice can be effectually made otherwise than upon the land of the taluk.

With regard to the second point, the words of the section seem to leave it doubtful whether the service must be published by sticking it up on the walls of the cutcheri, or whether it may be delivered to some person at the cutcheri for that purpose; and the authorities seem equally doubtful.

It would seem from the case of *Gouree Lall Singh* v. *Joodhisteer Hajrah* (3), that the learned Judges in that case considered that the notice should be *published* by the zemindar; whereas other cases seem to show that service upon the patnidar or his amla personally at the cutcheri is sufficient—(See *Mungazee Chaprassee* v. *Shibo Sunduree* (1).

We entertain considerable doubt as to both these points, and as the authorities upon the subject are by no means uniform, and it is desirable that some definite rule upon the subject should be

(1) 21 W. R., 369. (2) S. D. A., 1849, p. 871.
(3) I. L. R., 1 Calc., 359: 25 W. R., 141.

laid down, we think it right to refer the question to a Full Bench.

Whether the service of the notice under the above circumstances was sufficient in point of law to satisfy the requirements of the Regulation?

The Advocate-General (Mr. *Paul*) with him Baboo *Bosunt Coomar Bose*, Baboo *Umbica Churn Banerjee*, and Baboo *Bama Churn Banerjee* for the appellants. Section 8 of the Regulation refers to publication; the reason for the section is, and it was intended to provide, that notice of the sale should be given to the patnidar and durpatnidar. All the regulation intended was to lay down some rule to provide against fraud; the meaning of the word "cutcheri" in the section is the nearest large cutcheri at which the business of the landlord is ordinarily carried on. The Legislature never intended that the notice should be posted in a cutcheri on the land of the defaulter, for to mean this, the words "at the" must be struck out. In *Hunooman Dose* v. *Bipro Churn Roy* (1), it was held that it was more in compliance with the section to post the notice at a place where the gomastha carried on his business than at the cutcheri which was not in use. In *Mungazee Chaprassee* v. *Shibo Sunduree* (2), it was held that so long as the cutcheri, at which notice was served on the defaulter, was an adjacent one, at which all the business of the defaulting patnidar was carried on, that was sufficient. In the present case the tenants never paid their rents till a notice was served on them, and it was in this very cutcheri where such notice was always served on them, and this had been done for the last twenty years. Is the zemindar now entitled to turn round and say, "this is not the cutcheri in which a notice to avoid my patni ought to have been served?" The words in the Regulation do not necessarily mean the patni land of the defaulter; there is nothing to indicate that it was the patni land alone. In *Lootfonissa* v. *Kowar Ram Chunder* (3), it was held that a posting at any cutcheri of the defaulter was sufficient.

(1) 20 W. R., 132. (2) 21 W. R., 369.
(3) S. D. A., 1849, p. 371.

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The Court did not call on Mr. *Evans*, who appeared with Baboo *Troylokho Nath Mitter*, Baboo *Guru Das Banerjee*, and Baboo *Gogesh Chunder Dey* for the respondents.

The following was the opinion of the Full Bench :—

We are of opinion that in this case the notice was insufficient.

If there is a cutcheri upon the land of the defaulting patnidar, (by which expression we mean the land of the taluk in question), we think that the notice must be published at that cutcheri.

If there is no such cutcheri, the notice must be published at the principal town or village within the taluk.

We think also that the mere delivery of the notice to the patnidar, or one of his amlas, is not sufficient; but that it must be published in the manner required by the section. The necessity for accurately conforming to both provisions of the Regulation is laid down authoritatively by the Judicial Committee in the case of the *Maharajah of Burdwan* v. *Tara Soondery Debia* (1).

Before Sir Richard Garth, Knight, Chief Justice, Mr. Justice Mitter, Mr. Justice McDonell, Mr. Justice Prinsep, and Mr. Justice Tottenham.

1883 *August* 16.

SRINATH KUR AND OTHERS (PLAINTIFFS) *v.* PROSUNNO KUMAR GHOSE (DEFENDANT.)*

Limitation Act (XV of 1877,) Sch. II, Art. 141—Act IX of 1871, Sch. II, Art. 140—Suit by Reversioner for possession.

Under Article 141 of Schedule II, Act XV of 1877, a reversioner who succeeds to immovable property has twelve years to bring his suit for possession from the time when his estate falls into possession.

THIS was a reference to a Full Bench by CUNNINGHAM and MACLEAN, JJ. The referring judgments were as follows :—

MACLEAN, J.—The plaintiffs are the grandsons (daughter's sons) of Radha Madhub Pal Chowdhry, by his daughter Shantomoni who died in 1284 (1877): the defendant is his grandson by his daughter Anundmoyi, who died in 1270 (1863). The property in

* Full Bench Reference No. 82 of 1882, against the decree of the Additional Subordinate Judge of Dacca, dated 26th November 1881, affirming the decree of the Second Munsiff of Munshigunj, dated 25th April 1881.

(1) L. R., 10 I. A., 19 : S. C., *ante*, p. 619.

suit is the residue of Radha Madhub's estate, exclusive of what has been alienated. Plaintiffs claim their share as having descended to them on their mother's death.

The defence is that by adverse possession of his father and himself since 1270 (1863) the defendant has acquired a good title.

The first Court decided that the plaintiff's mother alienated her share, and so effected a partition, and that therefore she did not hold any title after her sister's death. The Subordinate Judge did not agree with this part of the Munsiff's decision, but both Courts find as a fact that plaintiff's mother was out of possession from 1270 (1863); and applying the rule that adverse possession which would have extinguished her right also extinguished the reversioner's right, they have dismissed the plaintiffs' suit.

The question, therefore, is whether the rule which was laid down under Act XIV of 1859 is good law under the Limitation Acts of 1871 and 1877.

In *Saroda Soondury Dossee* v. *Doyamoyee Dossee* (1), the rule is re-affirmed in clear terms. That was a case governed by Act IX of 1871. I am not, however, prepared to adopt the qualification there put upon the words "entitled to possession." These words seem to me sufficiently clear, and I am not disposed to say that they only mean entitled to possession if the last female also was entitled to possession at the time of her death.

In *Pursut Koer* v. *Palut Roy* (2), the last female owner had been out of possession for 36 years before her death, and while it was held that the case (although time had run out under Act XIV of 1859) was really a case of improper alienation rather than of adverse possession, it was also decided that the suit was certainly not barred under Act XV of 1877, Art. 141, unless it had been barred under some former Act. In the case before us time had not run out under Act XIV of 1859; and as the Acts of 1871 and 1877 are identical in this respect, the only question was whether the suit has been brought within 12 years of Shantomoni's death. This is not disputed.

I have some doubts about the correctness of the decision in *Saroda Soondury Dossee* v. *Doyamoyee Dossee* (1). I was a party to the decision in *Pursut Koer* v. *Palut Roy* (2), and also to a recent

(1) I. L. R., 5 Calc., 988. (2) I. L. R., 8 Calc., 442.

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decision, dated 14th March 1883, in appeal from Appellate Decree No. 1306 of 1881, in which, however, time had not run out against the late female owner.

In *Chunder Nath Das* v. *Asaram Das* (1), it was laid down that limitation ran under Art. 141 from the date of the plaintiffs' mother's death. This case is in support of the view I have taken. I think the question should be authoritatively settled by a Full Bench.

CUNNINGHAM, J.—The question raised in this appeal is whether under Art. 141 of the Limitation Act of 1877, the person entitled to the possession of property on the death of a Hindu or Mahomedan female can sue within 12 years of the death of the female, notwithstanding that the female's right of action was barred by 12 years' adverse possession.

As there appears to be some conflict of decision as to this point, and also as to whether time, which has begun to run against the female continues to run against the remainder man or whether a new period of limitation arises on the death of the female, I concur in referring both questions to the Full Bench.

Babu *Kalichurn Bannerjee*, for the appellants. In this case the widow's right is barred by 12 years adverse possession, so the question before the Court is whether the reversioner is also barred. Limitation runs not from the date of actual dispossession, but from the date when the estate falls into the reversioner's possession, *i.e.*, from the date of the death of the widow. *Chunder Nath Das* v. *Asaram Das* (1); see also *Pursut Koer* v. *Palut Roy* (2).

In an unreported case, Special Appeal 1306 of 1881, *Dwarkanath Gupta* v. *Komulmoney Dossee*, decided by Cunningham and Maclean, JJ., on the 14th March 1883, it was held that the meaning of Art. 141 is, that, although limitation has begun to run against a widow, yet a fresh period of limitation begins for the reversioner on her death. [GARTH, C.J.—The reversioner does not claim through the widow, but through the husband, so if limitation had run against the widow, he would not be bound by it.] As regards the case of *Nobin Chunder Chuckerbutty*

(1) 1 Shome, 165 (2) I. L. R., 8 Calc., 442.

v. *Guru Persad Doss* (1), it was decided on the Limitation Act of 1859, and it is very probable that the Legislature intentionally modified the effect of that case in passing the later Limitation Acts.

Baboo *Srinath Bannerjee* for the respondent cited *Nobin Chunder Chuckerbutty* v. *Guru Persad Doss* (1), and *Saroda Soondury Dossee* v. *Doyamoyee Dossee* (2).

The following opinions were delivered by the Full Bench :—

GARTH, C.J. (MITTER, J., McDONELL, J., and TOTTENHAM, J., concurring.)

We think that the rule which was laid down under the Limitation Act of 1859 is no longer the law under the Acts of 1871 and 1877.

A reversioner who succeeds to immovable property has now twelve years to bring his suit *from the time when his estate falls into possession.* (See Art. 141 of the Act of 1871, and Art. 140 of the Act of 1877). Under the Act of 1859 the language was very different. The suit under that Act must have been brought *within twelve years from the time when the cause of action arose;* and as it was considered by the Full Bench of this Court that the cause of action arose at the time when the owner of the inheritance was first dispossessed, they held that a twelve years dispossession, which barred the owner of the inheritance for the time being, (although a female), barred also the reversioner. See *Nobin Chunder Chuckerbutty* v. *Guru Persad Doss* (1).

The provision in the present Act, as well as that in the Act of 1871, as regards remaindermen and reversioners, assimilates the law in this country to the law of England. (See 3 and 4 Will. IV, Ch. 27, s. 4.) As the Subordinate Judge has decided in the plaintiffs' favor upon the merits, we think that they are entitled to a declaration of their rights, and to possession of the shares in question. They should also have their costs in all the Courts.

PRINSEP, J.—No doubt the terms of the Limitation Acts of 1871 and 1877 are materially altered in respect of the point now before us, from the Act of 1859, on which the judgment of the

(1) B. L. R., Sup. Vol. 1008 : S C. 9 W. R, 505

(2) I. L. R., 5 Calc., 938

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Full Bench in the case of *Nobin Chunder Chuckerbutty* v. *Guru Persad Doss* (1) proceeded; and although I do not wish to differ from the opinion of my learned colleagues, I have some hesitation in coming to the conclusion that the Legislature in 1871 deliberately altered the law thus laid down in 1868. I further observe that this point has never, that I can find, been before any Division Bench of the Court, except in the case of *Saroda Soondury Dossee* v. *Doyamoyee Dossee* (2), when the rule laid down in the Full Bench case above mentioned was followed.

(1) B. L. R. Sup. Vol., 1008: S. C. 9 W. R., 505.
(2) I. L. R., 5 Calc., 938.

ORIGINAL CIVIL.

Before Mr. Justice Norris and Mr. Justice Wilkinson.

RALLI *v* GAU KIM SWEE.

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May 14, 15, 16, 21, 25, 28, 31. *June* 1, 5, 11.

Evidence taken on Commission—Commission—Documentary evidence, Objection to admissibility of—Evidence taken by Commissioner beyond jurisdiction—Notice to produce original document—Refusal to produce—Evidence Act (I of 1872), *s.* 63, *sub-section* 3, 65, 66.

If, when evidence is taken before Commissioners, a document is tendered and objected to on any ground, the opposite party is not precluded from objecting to the document at the trial on any other ground. It is not necessary to state all the objections to the admissibility of a document when it is first tendered, but the party objecting is at liberty to take any fresh objection whenever the party producing the document tenders it in evidence.

Where a commission to take evidence is issued to any place beyond the jurisdiction of the Court issuing the commission, it is not necessary, in order to admit secondary evidence of the contents of a document, that the party tendering it should have given notice to produce the original, nor is it necessary for him to prove a refusal to produce the original.

ON reading the evidence taken under the commission, it appeared that the Commissioners had received and marked as an exhibit a document which had not been formally proved. An objection had been taken by the defendant's counsel before the Commissioners that the document was "immaterial and irrelevant," but no objection was taken as to want of proof.

Mr. *Evans* for the plaintiff now tendered the document.

Mr. *Jackson* for the defendant objected. Until a document is finally admitted in evidence, it is open to every objection that may be taken to the admission of a document. If the objection is that some link is wanting, the Court cannot admit it without consent.

Mr. *Evans*.—The defendants were represented by counsel before the Commissioners, and if their counsel did not choose to object that the document was not formally proved, it is too late to take the objection now. In *Robinson* v. *Davies* (1), Lush, J., said: "The only question is whether, no objection having been taken before the Commissioners to the non-production of the original invoices, it is now competent to the defendants to object that copies only

(1) L. R., 5 Q. B. D., 26.

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were produced. It seems to me clear, that if the defendants had been represented by counsel, and counsel had made no objection, no objection could be made now. If secondary evidence is received at *nisi prius* without objection it cannot be objected to afterwards. The defendants did not choose to be represented by counsel, but each party was represented by a Commissioner, and it was competent to the defendant's commissioner to have objected. If he had done so, and his objection had been overruled, it would have been a different thing. He made no objection, and I am clearly of opinion that it is too late to make one now."

Mr. *Jackson, contra.*—I don't wish to impugn the proposition laid down in *Robinson* v. *Davies* (1), that if secondary evidence is allowed to go in without objection no objection to it can afterwards be entertained. But if the evidence is illegal it may be struck out at the hearing, though no objection has been made before the Commissioner—*Hutchinson* v. *Bernard* (2); *Lumley* v. *Gye* (3). The objection is open until the document is properly proved; additional evidence may be adduced hereafter, and the plaintiff may be able to prove the document. But I can object whenever it is tendered if the proof is not sufficient. There is no such thing as a half-admitted document.

Mr. *Hull* on the same side.—With regard to *Robinson* v. *Davies* (1), the real question decided was, that primary evidence ought to be offered, but that secondary evidence can be given by consent, and the decision comes to this: that if secondary evidence is tendered and the other side are silent, that is evidence of consent and they cannot withdraw it; but if a document is not proved silence does not give proof. Either the document is in or not in. It is not necessary to raise all objections at the same time; an objection may be taken on the ground of insufficiency of stamp. That may be cured, but the person objecting would be entitled to object afterwards on the ground of want of proof of execution.

[NORRIS, J.—We are of opinion that the document ought not to be admitted. When counsel objects to a document being admitted he is not bound to state all his objec-

(1) L. R., 5 Q. B. D., 26. (2) 2 Moo. and Rob., 1.
(3) 3 E. and B., 114.

tions. If at a subsequent stage the counsel tendering the document thinks he has got over the first objection, the opposing counsel have the right to make any further objections to the admissibility of the document that they may think proper. It is open to the plaintiff to prove the document hereafter.]

A witness was called before the Commissioners to prove that a certain portion of the cutch shipped by the plaintiffs in the ship *Gertrude* had been appropriated to a particular Company in America. The following questions and answers were recorded :—

"*Question.*—Do you know what was done with the shipment per *Gertrude* so far as that appropriation that you speak of is concerned, that is, to whom it was appropriated?

"*Answer.*—To the Boston Dye Wood and Chemical Company. It was done by letter; the paper I now produce is a copy of the original letter and I know it to be a copy."

The defendant's counsel objected on the ground that it was immaterial and irrelevant.

Mr. *Evans* now tendered the copy.

Mr. *Jackson* objected on the ground that the absence of the original document had not been accounted for; that notice to produce it had not been given; and that a refusal to produce it had not been proved.

Mr. *Evans.*—Section 65 of the Evidence Act provides that "secondary evidence may be given of the existence, condition or contents of a document,

"(*a*.) When the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when after the notice mentioned in s. 66 such person does not produce it." And s. 66 provides that "secondary evidence of the contents of the documents referred to in s. 65, clause (*a*) shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his attorney or pleader, such notice to produce it as is prescribed by law, and if no notice is prescribed by law, then such notice as the Court considers reasonable under the

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circumstances of the case. Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it." And clause (b) of the section provides that the notice may be dispensed with, "when the person in possession of the document is out of reach of, or not subject to, the process of the Court."

The reason of the rule is, that it is useless to serve notice on a person beyond the jurisdiction of the Court when there would be no means of enforcing the production of the original.

It is a relaxation of the English rule. We had no power to compel the attendance of witnesses before the Commissioners, and no means of issuing notices to any person to attend through any Court. I have only to show that there was an original written, and that this is a copy of it in order to use it as secondary evidence. I am entitled to do so because the original is in the possession or power of some person beyond the jurisdiction of the Court. No objection was taken before the Commissioners that the document spoken to by the witness was only a copy. If that objection had been taken we might have been able to produce the original. In any case the Court has the power under the section to dispense with a notice.

Mr. *Jackson, contra.*—The document was objected to when originally tendered. On the Evidence Act it is clear that this copy is not admissible. Is the Court to assume that it was intended to alter the English law? The Evidence Act merely condenses Taylor on Evidence with some alterations which are manifest. There is no code in England; the law of evidence is Judge-made law and can be modified from time to time.

The first five exceptions in s. 66 are clearly in accordance with English law. As to the sixth it can be interpreted to be also in accordance with the English law. In England it would be necessary to prove that notice had been given, and that the person to whom it was given refused to comply with it. The reason is that it is necessary to get the best evidence if possible, and to satisfy the Court that an endeavour has been made to get it—Taylor on Evidence, 7th Edition, p. 409. There is no question, but that according to English law, notice and a refusal to comply with it

would have to be proved. Clause (*b*) of s. 66 provides that notice is not required "when the person in possession of the document is out of reach of or not subject to the process of the Court." Section 65 provides for the admission of secondary evidence "when, after the notice mentioned in s. 66, such person does not produce" the original document. That shows that there must be proof of refusal to produce. The mere fact that the document is not produced is not sufficient to allow the admission of secondary evidence. The words must be read, "if such person after such notice does not produce." If that is so the law is in entire accordance with the English law. There must be evidence explaining the non-production of the original, otherwise the original might be in Court and secondary evidence be given of its contents. Upon what principle can it be said that, because a person is out of the jurisdiction, he is not to be asked to produce an original document? In England there are no degrees of secondary evidence; here there are—see s. 63. This copy could only come under clause (3) of s. 63. There is no evidence to show that it was made from or compared with the original. Merely saying that it is a copy is not a sufficient compliance with the Act.

Mr. *Phillips* on the same side.—Section 63 provides that where the person is out of the jurisdiction, secondary evidence may be given after the notice required by s. 66 has been given. The last paragraph of (*a*) applies to everything which has gone before. If the Legislature meant to exempt such documents from the rules as to notice it would not have included them in a provision which refers to all. "Such notice" is the notice prescribed by law, and if no notice is prescribed by law, then such notice as the Court considers reasonable. It is not said that no notice need be given. There must be at least such notice as the Court considers reasonable. All notice is not dispensed with. It is not reasonable that no attempt should be made to produce the original.

NORRIS, J.—We are of opinion that the document is admissible. Mr. Jackson says that it is not proved to be a copy within the meaning of s. 63 of the Evidence Act, and that if it is a copy at all it comes under subsection 3. The witness says: "The copy now produced is a copy of the original, and I know it to be so."

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Mr. Jackson says that that is not sufficient to show that the document is a copy made from or compared with the original. I think the fair interpretation is that the witness knew it to be a copy made from the original from personal knowledge. Then was there an original document? The evidence shows that a letter was sent to the Boston Dye Wood Company, and that certain action was taken upon it.

Then is this copy admissible in evidence? Section 65 says: "Secondary evidence may be given of the existence, condition or contents of a document in the following cases:—

"(*a*.) When the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when after the notice mentioned in s. 66 such person does not produce it." There is therefore a clear legislative enactment that notice, or a reasonable notice, must be given, but that is qualified by s. 66, clause (*b*) which dispenses with notice "when the person in possession of the document is out of reach of, or not subject to, the process of the Court."

Mr. Jackson argued that there must be evidence of a refusal to produce the original document. I do not see that that is required by the Act at all, and I do not think that it is requisite.

Mr. Phillips wishes us to read "such notice" as applying to statutory notice first and then to reasonable notice. That I think would be governed by or subject to sub-section 6 of s. 66. The Boston Dye Works are persons out of the jurisdiction of the Court, and we think therefore that notice was not requisite and that the copy is admissible.

Solicitors for the plaintiffs: Messrs. *Sanderson & Co.*

Solicitors for the defendants: Messrs. *Watkins & Watkins.*

PRIVY COUNCIL.

AHMAD HOSSEIN KHAN (DEFENDANT) *v.* NIHAL-UD-DIN KHAN (PLAINTIFF)

P. C.*
1883
March 16.

[On appeal from the Court of the Commissioner of the Faizabad Division of Oudh.]

Res judicata—Suit for Maintenance—Limitation Act (XV of 1877,) Sch 2, Art. 132.

An allowance for the maintenance of a younger member of a family, was charged upon the inheritance to which the eldest male member alone succeeded. In a suit for such an allowance brought by a younger brother against the elder, who had succeeded their deceased father in the possession of the estate, *held* that an order made dismissing a claim for maintenance preferred by such younger brother against their father in his life-time, founded on an ekrarnama, did not afford a defence under s. 3 of the Code of Civil Procedure.

Held, also, that the brothers having made an agreement, fixing the allowance for maintenance at a certain sum, the younger brother agreeing to receive a less sum for a defined period, he could only obtain a decree for the allowance so reduced.

An objection taken on this appeal, that this suit should have been brought on that agreement, *held* taken too late; the defendant having been made aware of the agreement at the hearing, and not having objected on this ground in the first Appellate Court. A suit for arrears of such maintenance, within twelve years, is within time under Act XV of 1877.

APPEAL from a decree (30th January 1879) of the Commissioner of the Faizabad division, confirming a decree (1st June 1878) of the Deputy Commissioner of the Lucknow district.

The question raised on this appeal related to a charge for maintenance on the village Khalispur in the Lucknow district, and others in Pertabghar in Oudh, which were granted maafi, in the time of the Nawabi, to one of the ancestors of the late Mahomed Hossein, the father of the parties to this suit, who were brothers by different mothers.

These maafi estates had been charged, at the time of the grant, with the payment of sums for the maintenance of the younger members of the family in the hands of the maafidar.

* *Present:* LORD BLACKBURN, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH, and SIR A. HOBHOUSE.

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Mahomed Hossein in 1861 received from the British Government a sanad confirming the rent-free holdings, as they had existed under the Mahomedans; and, he being in bad health, his mother Fatima Bibi acted as manager of the estates for him.

On the 10th July 1862, a claim for Rs. 1,128 brought by Nihal-ud-din against his father for a monthly allowance due on an ekrarnama purporting to be signed by Fatima Bibi, was dismissed by an Assistant Commissioner in the Lucknow district.

Upon the death of Mahomed Hossein in 1863, Nihal-ud-din disputed his elder brother's right to the inheritance, and in proceedings, taken both before and after the passing of Act I of 1869, unsuccessfully claimed to exclude his brother.

On the 5th March 1878, he brought this suit for a declaration of his right to maintenance, claiming arrears for eleven years and eight months, at Rs. 140 per mensem. At the hearing in the Court of first instance an agreement, dated 11th December 1869, was produced, whereby Nihal-ud-din, giving up his claim to the estates, accepted an allowance of Rs. 75 per mensem for one year, with Rs. 100 per mensem for the next six years, and after that Rs. 140 per mensem.

The Court held that neither with reference to the Assistant Commissioner's order of 1862, nor on the ground of limitation, was the suit barred; and that there was no doubt that the Government grant contemplated the maintenance of this rent-free holding, as it had existed under the Nawabi, subject to the charge for the benefit of the younger members of the family. The suit was decreed in favor of the plaintiff, and an appeal was dismissed by the Commissioner, who, as the Court exercising the final appellate jurisdiction, gave to the defendant, on his application, a certificate for appeal to Her Majesty in Council under Chapter XLV of the Code of Civil Procedure, Act X of 1877.

On this appeal,—

Mr. *J. H. W. Arathoon* appeared for the appellant.

Mr. *C. W. Arathoon* for the respondent.

For the appellant it was argued that this claim, regarded as

of doubtful validity in regard to the altered circumstances of the maafi estate after 1858, and again after 1869, had been concluded by the proceedings in 1862. Again, the production of the agreement of 1869 showed that the alleged charge on the maafi estates was not the ground on which the respondent relied. If maintainable at all, this claim could only be based on that agreement.

For the respondent it was argued that the judgments of the lower Courts were correct. Any objection to the suit not having been framed upon the agreement of 1869 should have been taken in the lower Court. But it was not a tenable objection; the undertaking to pay the allowance confirming the right of the plaintiff rested on the original charge on the estate.

Their Lordships' judgment was delivered by

SIR R. COUCH.—This is a suit between two brothers, the sons of Mahomed Hossein Khan, who died in November 1863. The plaintiff in the suit, the respondent before their Lordships, was the second son of Mahomed Hossein Khan, and the defendant, the appellant, was the elder son. It appears that upon the death of their father there was considerable litigation between the brothers with regard to the right to the estate of the father. That litigation began in 1863, and the result of it was that the defendant, the appellant, was declared to be entitled to the estate. After that the respondent brought a suit against his brother in which he claimed to recover Rs. 19,600 for arrears of maintenance for 11 years and 8 months, *viz.*, from the 1st July 1866 to the end of February 1878, at Rs. 140 a month, and a declaration of his right to maintenance in perpetuity, and to have it judicially declared that the maintenance was a debt due from the estate of Khalispur, situated in the Lucknow district, as also from Mamni and Motka, being the estates which the defendant had recovered by means of the litigation. He appears to have fixed the 1st July 1866 for the beginning of this claim for maintenance, and claimed arrears from that date, as being the day on which he was himself dispossessed of the estate and the defendant got possession of it. His case was that he was legally entitled to maintenance at the rate of Rs. 140 a month from the estate of his deceased father; and in his plaint he founded his claim

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upon an order of the Deputy Commissioner of Lucknow in a suit between the father and Mussamut Bibi Fatima his grandmother and the present defendant, who was the plaintiff in that suit. He also said that he was dispossessed of the property under an order dated 29th June 1865, which was upheld by Her Majesty in Council. The defendant, by his written statement, set up various answers to the claim. The material defences were that the plaintiff was not entitled to any maintenance as the son of Mahomed Hossein; that the claim was barred by limitation, as the plaintiff himself said that he had not received maintenance since September 1863; and that the defendant was not bound by the document which was filed by Bibi Fatima, being a document alluded to in the plaint, nor by any document filed by Mahomed Hossein; and, lastly, in the 11th paragraph of his written statement, he alleged that the claim was barred by the fact of its being *res judicata*. Issues were settled which raised what are the substantial questions between the parties, and they were: (1), is the suit barred by *res judicata*; (2), is the suit barred by limitation; and, (3) and (4), which may be taken together, was the plaintiff entitled to the maintenance, and if so at what rate, and from whom? Both the lower Courts have made decrees in favor of the plaintiff, and the defendant has appealed to Her Majesty in Council from the decree of the Commissioner which affirmed the decree of the first Court.

With regard to the first question, whether the suit was barred by *res judicata*, the document which is relied upon by the defendant appears to be an order made in a suit brought by the plaintiff against Mahomed Hossein the father, in which he claimed to be entitled to a monthly allowance for maintenance founded on some ekrarnama, which would appear to have been executed by the grandmother, who had the management of the property in consequence of Mahomed Hossein being incapable of taking care of his affairs. That is clearly not an order which would be *res judicata* in the present suit. It was not an adjudication between these parties but between the plaintiff and his father, and it was altogether upon a different sort of claim. There is no ground for saying that the lower Courts were wrong in deciding against the defendant upon that issue.

Another question was raised which perhaps it may be well for their Lordships to notice. It was said that, there being an agreement, which will be presently mentioned, and which was put in as evidence on behalf of the plaintiff, a suit should have been brought upon that and not in the present form. If there had been ground for this objection, it might and should have been taken when the defendant appealed to the Commissioner. It was said that he could not know of the objection when the written statement was filed, because the agreement was produced for the first time at the hearing of the cause when evidence was given, and it had not been filed; but after the hearing, and after the production of the agreement, the defendant knew perfectly well that it was being used against him, and when he made his appeal to the Commissioner he could have taken this objection. If there is any ground for the objection it cannot be taken in the present stage of the proceedings.

The next question, in the order in which the issues were framed, is the law of limitation; but perhaps it will be better first to consider the other, which is the main question in the case, and which arises upon the third and fourth issues, namely, whether the plaintiff is entitled to receive the maintenance.

The lower Courts have come to this conclusion upon that question: As to his being entitled to receive the maintenance. The Officiating Deputy Commissioner says: "Moreover it appears to me that the defendant, as maafidar, merely takes that estate in trust, subject to the rent-charges, and that he is bound to pay the stipends with which the estate is charged. Sanad or act of Government does not absolve him from this charge. As regards plaintiff's right to the allowance claimed, there is, in my opinion, no doubt; the documentary evidence referred to and filed fully establishes this fact, that the cadets of the family were assigned certain specified allowances payable to them from the estate by the eldest male member managing the estate." The Commissioner says: "Regarding the payment of the allowance, I consider the evidence on the file of the lower Court amply sufficient. It clearly establishes that the cadets of the family were assigned certain allowances payable to them from the estate by the eldest uncle in possession." There is this finding of both the

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Courts to the effect that the allowance for maintenance was charged upon the estate; and there is evidence in the case upon which they might well come to that conclusion.

It appears that in December 1869 the parties came to an agreement. The defendant's part of agreement states "that Mahomed Nihal-ud-din Khan"—that is the plaintiff—"has waived his claim to succession of the estate, and, having filed a registered deed of compromise (razinama) in Court, has caused the suit to be withdrawn. That for his personal expenses I have fixed an allowance of Rs. 75 per mensem for a term of one year, and then for the next six years Rs. 100 a month; and as at present I am very much in debt, owing to the law expenses incurred, so much so that many of my maafi (revenue-free) villages are mortgaged and hypothecated and the estate yields very little profits, I cannot afford at present to pay the old allowance of Rs. 140 per mensem to Mahomed Nihal-ud-din Khan. But after the expiration of the aforesaid term of seven years I shall continue to disburse the old pay of Rs. 140 a month in perpetuity. If at any time I may offer any objection or hesitate in paying up each of the three descriptions of monthly allowances, Mahomed Nihal-ud-din Khan will be at liberty to realise the same by a suit in Court. If for my own necessity I may mortgage or hypothecate the maafi villages, so that the property left may be insufficient to meet the monthly allowance fixed, I will in that case pay the said allowance out of the estate Khalispur Ameliha." And there is a corresponding agreement, of the same date, by the plaintiff, which recognises this agreement. This document was put in by the plaintiff, and formed a very important part of the evidence in support of his case. Besides that, there was evidence of some previous proceedings with reference to this estate and the allowances for maintenance, in which there was a report of the Extra Assistant Commissioner of Lucknow made under the order of the Deputy Commissioner, stating that, in the opinion of the Extra Assistant Commissioner, it was proved that the parties mentioned received the allowances shown opposite to their names. There is mentioned the name of "Nihal-ud-din Khan, Rs. 140;" which would seem to be the allowance that was at one time paid. Their Lordships think that the lower Courts,

with this evidence before them, were quite justified in finding that the plaintiff was entitled to an allowance for his maintenance as a charge upon the property which had come from the father, Mahomed Hossein Khan. If that is the case, the plea of the law of limitation is answered, because it is shown that the maintenance was a charge upon the property, and 12 years is the term which is applicable to the suit. The plaintiff only seeks to recover arrears from the 1st of July 1866, which is within the 12 years. Therefore the issue raised as to the law of limitation was properly found against the defendant.

But there remains this question: Although it would appear that at one time Rs. 140 had been paid monthly for the maintenance, when the parties came to the agreement which has been read in consequence apparently of the state of the property, the plaintiff was willing to receive less than the Rs. 140 for a part of the time. It was then arranged that Rs. 75 should be paid from the date of that agreement for the year 1870; that Rs. 100 should be paid up to the 14th December 1876, and after that time that the Rs. 140 should be paid. Now the plaintiff's case was mainly supported by this agreement, Exhibit A: it was put forward at the outset of the case as his evidence by the pleader who appeared for him; and it does seem right that he ought not to be allowed to recover more than he agreed by that document to receive. If he had had to sue upon the agreement he could only have recovered that. He has sued in a different way; but their Lordships are of opinion that this is all that he ought to recover in the present suit.

The consequence will be that their Lordships will humbly advise Her Majesty that the decree which has been made in the plaintiff's favour by the lower Courts should be altered by giving to the plaintiff the arrears, calculated in the manner provided for in the agreement, with interest upon those arrears from the date of the decree at the same rate as has been given by the lower Courts upon the sum which they awarded. The decrees of the lower Courts as to the costs will stand, and with regard to the costs of this appeal, the respondent has really substantially succeeded in it. The objections of law which were taken by the appellant,

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and without which he would have had no right of appeal, have entirely failed, and their Lordships therefore think that the appellant ought to pay the costs of the appeal.

Decree modified.

Solicitor for the appellant: Mr. *T. L. Wilson.*

Solicitor for the respondent: Mr. *Horace Earle.*

TAROKESSUR ROY (PLAINTIFF) *v.* SOSHI SHIKHURESSUR ROY (DEFENDANT).

SOSHI SHIKHURESSUR ROY (DEFENDANT) *v.* TAROKESSUR ROY (PLAINTIFF).

P. C.*
1883
February 29. *March* 2 *and* 17.

[On appeal from the High Court at Fort William in Bengal.]

Hindu law—Will, Construction of—Gift ineffectual so far as it departs from the law of inheritance—Gift over of accrued share.

A gift by will, attempting to exclude the legal course of inheritance, is only effectual, in favor of such person as can take, to the extent to which the will is consistent with the Hindu law And it is a distinct departure from that law to restrict the order of succession to males excluding females.

A testator gave by his will to three sons of his brother certain estates "for payment of the expenses of their pious acts" He also directed as follows · "The said three nephews shall hold possession of the above in equal shares, and shall pay the Government revenue of the same into the Collectorate. They shall have no right to alienate the same by gift or sale, but they, their sons, grandsons, and their descendants in the male line shall enjoy the same, and shall perform acts of piety as they respectively shall think fit for the spiritual welfare of our ancestors If any die without leaving a male child, which God forbid then his share shall devolve on the surviving nephews, and their male descendants, and not on their other heirs"

In a suit between the survivor of the three nephews and the testator's heir, *held*, that the attempt to alter the legal course of inheritance failed, and that the estate taken under the above clause was only for life.

The gift over of a life estate was competent; it being to persons alive, and capable of taking on the death of the testator, and to take effect on the death of a person or persons then alive.

On the death of one brother his share went to the two other brothers, and on the death of one of the latter his augmented share, made up of his original and accrued share, went to the survivor.

* *Present:* LORD BLACKBURN, SIR B PEACOCK, SIR R. P. COLLIER, and SIR A HOBHOUSE.

APPEAL and cross appeal from a decree of the High Court, (9th September 1880) (1) modifying a decree of the first Subordinate Judge of the Rajshahye district (2nd May 1878.)

Chandra Shikhuressur Roy and Moheswar Roy were brothers, of whom the former dying in 1865 left a son, Kumar Shikhuressur Roy, the respondent and cross appellant He had made a will containing a bequest in favor of Moheswar's three sons, of whom the survivor, Tarokessur Roy, was the appellant and cross respondent.

The material clause of the will, and the facts relevant to this report, appear on their Lordships' judgment.

In the Original and Appellate Courts it was found that the will was genuine, and the only question now raised was as to its legal effect. The Subordinate Judge of the Rajshahye district held that the appellant, Tarokessur Roy, was entitled to an absolute interest in the estates given by the will; but the High Court, (GARTH, C.J., and MITTER, J.,) held that the gift, in so far as it restricted the inheritance to male descendants, was inoperative; that on the authority of the *Tagore* case (2) the three brothers were entitled to the estate in equal shares for their respective lives; and that the particular estate of inheritance which the testator had attempted to create was void. But that the gift over to the surviving brothers was valid according to the Hindu law, as declared in the above cited case, and also in *Sooryeemoney Dossee* v. *Denobundho Mullick* (3). On the remaining question, whether the share of the brother who died first went over, with the share of him who died next, to the surviving brother, they held that it was the intention of the testator that the whole share, original and accrued, should pass. The judgment is reported in I. L R, 6 Calc., 421.

Against this decision Tarokessur appealed on the ground that he was entitled to the absolute interest. The respondent, Shikhuressur Roy, contesting his right to more than a life estate, filed a cross appeal to the effect that the will, properly construed,

(1) See *Shoshi Shikhuressur Roy* v. *Tarokessur Roy*, I L. R, 6 Calc, 421.

(2) *Jotendromohun Tagore* v. *Ganendromohun Tagore*, 4 B. L R., O. C., 103, 9 B L. R, 377; S C. L. R., Sup. Vol., 47.

(3) 9 Moore's I A, 123

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gave no more than a life estate on the one-third share as it originally stood, without the accrued shares.

Mr. *R. V. Doyne* and Mr. *C. W. Arathoon* appeared for Tarokessur Roy.

Mr. *J. D. Mayne* and Mr. *J. T. Woodroffe* for Soshi Shikhuressur Roy.

For the appellant it was argued that the clause in the will now in question gave, when only due effect was given to the ineffectual attempt to restrict the right to inherit to males, an absolute interest, as well in the survivor's own third part as in the accrued shares to which he had succeeded, under the gift over, on the deaths of his brothers, respectively.

The testator having attempted to effect what was contrary to the Hindu law, his will was to that extent inoperative. But it did not follow that he was intestate as to the estate of inheritance, of which he had attempted the disposal. For the latter proposition the *Tagore* case (1), in which, in the most express terms, the estate given to the first taker was a life estate only, was hardly to be considered an authority.

That case did not precisely apply to what had arisen here, the testator in this instance having attempted to create an estate of inheritance in the first taker. The conditions which he had attempted to impose could not indeed be held valid; but the intention of the testator, to the extent to which it was consistent with the Hindu law, should receive effect. This it would hardly receive if the absolute interest were cut down to a life estate. It would be sufficient to strike out the words of the will attempting to control the course of descent; and the gift of the absolute interest could be maintained on the principles indicated in *Soorjeemoney Dossee* v. *Denobundho Mullick* (2.) In connection with this argument reference was made to *Bhoobun Mohini Debia* v. *Hurrish Chunder Chowdhry* (3); *Ramlal Mookerjee* v. *The Secretary of State for India* (4); *Soudaminey Dossee* v. *Jogesh Chunder Dutt* (5);

(1) 9 B. L. R., 377.
(2) 9 Moore's I. A., 123.
(3) L. R. 5 I. A., 138; S. C. I. L. R., 4 Calc., 23.
(4) I. L R., 7 Calc., 304.
(5) I. L. R., 2 Calc., 262.

Srimati Bramamayi Dossee v. *Jageschandra Dutt* (1); *Kherodemoney Dossee* v. *Doorgamoney Dossee* (2); the Hindu Wills' Act, (XXI of 1870); and the Indian Succession Act, 1865.

For the respondent and cross appellant, it was submitted that the surviving nephew was entitled only to a life estate, and that he took his one-third without the addition of the shares of his deceased brothers. The will was valid only to the extent of giving a life estate to the three nephews—a proposition clearly resting on the principle of the *Tagore* case, which was applicable here. The testator had attempted to make the property descend in three lines, restricted in a manner not permitted by Hindu law. That being the state of things, to give an absolute estate to the first taker, striking out the restriction as to the mode of descent, and to let the gift operate as a gift of the inheritance, would be to make another, and a distinct line, which (however well it might accord with law), would not accord with the testator's intention. The creation of a life estate in such a case as the present agrees with what the testator certainly, at least, intended; but the creation of an unrestricted estate of inheritance would not. Again, as a gift of the inheritance, the disposition would form a gift to a class some of whom were not in existence at the death of the testator; and it was, as regards the inheritance, affected by the invalid restriction. That the gift over was valid would appear doubtful if the case were put (which might have arisen) of two of the nephews surviving the third, and then one of the survivors dying, leaving sons who would stand in his place. Forming a class, and entitled to take as a class if at all, they could not all take, so much of the gift as related to the sons being invalid; and it being the rule that, in gifts to a class, there could not be a choice between two objects thereof, so as to give effect to one part, and not to another—*Leake* v. *Robinson* (3); *Pearks* v. *Moseley* (4). This doctrine has been recognized in India—see *Callynauth Naugh Chowdhry* v. *Chundernath Naugh Chowdhry* (5); and *Soudaminey Dossee* v. *Jogesh Chunder Dutt* (6).

(1) 8 B L. R, 400
(2) I. L. R., 4 Calc., 455.
(3) 2 Mer., 363.
(4) L. R., 5 App. Cas., 714.
(5) I. L. R., 8 Calc., 378.
(6) I. L R, 2 Calc, 262

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Reference was also made to the *Tagore* case (1), and *Kherodemoney Dossee* v. *Doorgamoney Dossee* (2). Tried by this test the gift over was of questionable validity.

Mr. *Doyne* replied.

On a subsequent day (March 17th) their Lordships' judgment was delivered by

SIR R. P. COLLIER.—The question in these appeals arises upon the construction of a clause in a Hindu will, which is in these terms :—

"My brother's sons, Kumar Jagodesur Roy, Kumar Tarokessur Roy, and Kumar Sibesur Roy, shall receive, for defrayment of the expenses of their pious acts, the following out of the properties left by me, to wit, my one-half share in pergunnahs Chowgaon and Khord Chowgaon, recorded as No. 278 in the Collectorate of Zillah Rajshahye, in Dehi Dalil, and others, appertaining to tuppa Byas, and recorded as No. 456, and in mouzah Dehi Gobindpore, in pergunnah Santosh, recorded as No. 96 in the touzi or rent-roll of the Collectorate of Zillah Dinajpore. The said three nephews shall hold possession of the same in equal shares, and shall pay the Government revenue of the same into the Collectorate. They shall have no right to alienate the same by gift or sale; but they, their sons, grandsons, and other descendants in the male line, shall enjoy the same, and shall perform acts of piety as they respectively shall see fit for the spiritual welfare of our ancestors. If any of them die without leaving a male child (which God forbid), then his share shall devolve on the surviving nephews and their male descendants, and not on their other heirs."

The facts necessary to be stated are, that the three nephews of the testator were living at his death; that two of them died before the institution of the present suit, one unmarried, the other leaving a widow but no issue; that the suit was instituted by Kumar Tarokessur Roy, the survivor, against the infant son of the testator, represented by Hurgobind Bose, appointed manager of the estate by the Court of Wards, to obtain a declaration of title to and possession of half of pergunnahs Chowgaon and Khord Chowgaon. No question arises as to Gobindpore in this suit.

(1) 4 B. L. R., 103 at p. 179. (2) I. L. R., 4 Calc., 455.

The plaintiff based his claim on the clause of the will above set out, contending that by its terms an absolute estate was given in undivided shares to the three nephews; that upon the death of his brothers their shares devolved on him, and he was thus entitled to the whole.

The defendant denied the execution and validity of the will, both of which issues have been disposed of by concurrent judgments of the Courts against him. He further contended that upon the true construction of the will, which is narrowed to that of the clause in question, the plaintiff was entitled only to a life estate in one-third of the property devised.

The Court of first instance gave the plaintiff a decree for his whole claim.

This decree was altered by the High Court, which gave him a life interest only in the whole of the property.

From the judgment of the High Court there are cross appeals. The first by the plaintiff, on the ground that he was entitled to an absolute estate in the whole. The second by the defendant, on the ground that the plaintiff was entitled to a life estate in one-third only. It will be convenient to deal firstly with the first appeal.

The grounds of the judgment of the High Court that the plaintiff was entitled to a life estate only may be thus shortly stated.

They held, on the authority of *Jottendromohun Tagore* v. *Ganendromohan Tagore* (1) commonly called "the *Tagore* case," that the testator, having attempted to create an estate of inheritance unknown to and opposed to Hindu law, that estate of inheritance was void, and that the will operated only to confer on the plaintiff an estate for life.

The *Tagore* case is so well known, and has been so often referred to by this Board, that it is unnecessary to cite it at length, and it is enough for the present purpose to refer to the following passage:—

"If the gift were to a man and his heirs to be selected from a line other than that specified by law, expressly excluding the legal

(1) L R Sup. Vol Ind. Ap., 47.

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course of inheritance, as, for instance, if an estate were granted to a man and his eldest nephew and the eldest nephew of such eldest nephew, and so forth for ever, to take as his heirs, to the exclusion of all other heirs, and without any of the persons so taking having the power to dispose of the estate during his lifetime, here, inasmuch as an inheritance so described is not legal, such a gift cannot take effect, except in favour of such persons as could take under a gift to the extent to which the gift is consistent with the law. The first taker would, in this case, take for his lifetime, because the giver had at least that intention. He could not take more, because the language is inconsistent with his having any different inheritance from that which the gift attempts to confer, and that estate of inheritance which it confers is void."

It is true that the departure from Hindu law in the present case is not as great as in the case supposed in this passage, or as in the *Tagore* case, where the attempt was to establish what would be called an estate in tail-male according to English law. But the attempt to confine the succession to males, to the entire exclusion of females, is, though not so great, yet a distinct departure from Hindu law, "excluding," in the terms of the judgment quoted, "the legal course of inheritance."

It has been contended, on the part of the appellant, that the present case is distinguishable from the *Tagore* case, on the ground that, in that case, the first estate given was in terms an estate for life; that in the present case, if the words relating to succession, *viz.*, "that their sons, grandsons, and other descendants in the male line shall enjoy the same, and shall perform acts of piety, as they respectively shall think fit, for the spiritual welfare of our ancestors," were struck out, the gift would be of an estate of inheritance; and that the intention of the testator to confer an estate of inheritance may be effectuated by striking out so much of the clause above quoted as excludes females from the succession.

Their Lordships are unable to accede to this view.

Considering that the gift to the nephews is expressed as to be received for the defrayment of their pious acts, and that alienation is forbidden, they do not construe the gift, independently of the words prescribing the course of succession, as conferring an absolute estate. They are further of opinion that to alter the

words prescribing the course of succession, so as to admit females, would be in effect to make a new will for the testator, and one which, so far from carrying his intentions into effect, would be in direct opposition to his intention, and indeed to his main object, expressed in other parts of his will, as well as in this clause, *viz.*, to exclude females.

The case of *Bhoobun Mohini Debia* v. *Hurrish Chunder Chowdhry* (1) has been cited on behalf of the appellant, in which the following words of a grant,—"You are my sister; I accordingly grant you a taluk for your support, . . . being in possession of the lands, and paying rent, &c., to the tahut jamma, do you and the generations born of your womb successively (Santán sreni kramé) enjoy the same, no other heir of yours shall have right or interest,"—were construed as conferring an absolute estate, defeasible on the failure of issue living at the death of the donee. In that case the words of gift (of which the original in the native language are given) were held to have no technical meaning, signifying much the same as "children and grandchildren," and indicating an estate of inheritance, while the only words which created a difficulty, "no other heir of yours shall have right or interest" were held to be satisfied, by giving them the effect of making the absolute estate defeasible in the event of the failure of issue living at the time of the death of the donee, in which event the estate was to revert to the donor and his heirs. This case has no bearing on the present.

For these reasons they are of opinion that the first appeal should be dismissed.

The second appeal arises on the construction of the concluding paragraph of the clause:—

"If any of them die without leaving a male child (which God forbid), then his share shall devolve on the surviving nephews and their male descendants, and not on their other heirs."

Their Lordships construe this clause thus, in accordance with the construction put upon it by both the Indian Courts: "Any of them" means any of the three nephews, not any of their descendants; on the death of any of three nephews his share shall

(1) L R 5 I. A., 138; I. L. R., 4 Calc., 23

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go to the surviving nephews or nephew, not to the descendants of a dead nephew; but on the estate getting into the hands of the surviving nephew or nephews, it is to descend, as had been before provided, to males only. This construction disposes of an ingenious argument of Mr. Mayne—based on the hypothesis that upon the death of the second nephew his share would go to his surviving brother, and to the "male descendants" of his dead brother—that this would be a gift to a class, some of whom, *i.e.*, the male descendants, could not take, and would therefore, by a well known rule of law, be altogether invalid.

According to the construction which their Lordships adopt, the gift over was to persons alive, and capable of taking on the death of the testator, to take effect on the death of a person or persons also then alive, and was competent, according to the authority of *Sreemutty Soorjeemonee Dossee* v. *Denobundhoo Mullick* (1), as explained in the *Tagore* case. For the reasons above given it could only confer an estate for life.

One point only remains to be considered, which was indeed not argued before their Lordships, but is suggested in the judgment of the High Court, *viz.*, whether upon the death of the brother dying secondly, his original share only, or the share also of his deceased brother which had accrued to him, went over to the surviving brother. It is undoubtedly a rule of English law that, when a fund is given to a class of persons with a direction that, on the death of any of them, their shares are to go over, the original shares only and not the accruing shares, will go over. This rule was stated by Lord Hardwick in *Pain* v. *Benson* (2) and has been followed, not always without expressions of reluctance, by a long series of decisions.

But an intention that the accruing shall go over with the original shares has been inferred where there is what has been called "an aggregate fund" which the testator desires to keep unsevered (when the gift has been to several with benefit of survivorship), (3) when, in addition to the word "share," the word "interest"

(1) 9 Moore's I. A., 135.

(2) 3 Atk., 80.

(3) *Worlidge* v. *Churchill*, 3 Brown's Ch. Rep., 465. *In re Crawhall's Trust*, 8 De. G., M. & G., 480.

is used, (1) or where the words are his "or her share or *shares*" (2), so that the application of the doctrine to English wills has sometimes given rise to questions of some nicety. What might have been the effect of the words in question had they been found in an English will, their Lordships think it unnecessary to decide, as they are of opinion that the rule, founded in a great measure on our peculiar doctrine, that the heir-at-law is not to be disinherited but by express words or necessary implication, has no application to the wills of Hindus. It may be observed that such a course of devolution is the ordinary course for Hindu property as between brothers inheriting from brothers, and would present itself most readily to the mind of a Hindu testator; so that, even if the English rule should be applied anywhere beyond the domain of English law, it could hardly be applied to Hindu wills without defeating the intention. Their Lordships feel constrained by no rule of law to read the words in any other than their natural sense, *viz.*, that, on the death of the first brother, his share goes to his two brothers, and that, on the death of one of these, the share which he had at his death, made up of his original and his accrued share, goes to the surviving brother.

For these reasons their Lordships will humbly advise Her Majesty that the judgment appealed against be affirmed, and that both appeals be dismissed.

Appeals dismissed.

Solicitor for the appellant in the appeal and respondent in the cross appeal: Mr. *T. L. Wilson.*

Solicitor for the respondent in the appeal and appellant in the cross appeal: Mr. *H. Treasure.*

P. C.*
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February 15, 16, 17.
March 15.

MOHESH LAL (PLAINTIFF) AND MOHANT BAWAN DAS (DEFENDANT)

[On appeal from the High Court at Fort William in Bengal.]

Mortgage, Payment of—Extinction of charge—Intention of Parties—Presumption.

Whether a mortgage, paid off, has been kept alive or extinguished depends upon the intention of the parties; the mere fact that it has been paid off

* *Present:* LORD BLACKBURN, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH, and SIR A. HOBHOUSE.

(1) *Douglas* v. *Andrews*, 14 Beavan, 347.

(2) *Wilmot* v. *Flewitt*, 11 Jur., N. S., 820

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not deciding the question whether or not it has been extinguished. Express declaration of intention will cause either the one result or the other, and in the absence of such expression, the intention may be inferred, either one way or the other.

A lender of money upon a mortgage, which, however, having been made by a person not having authority to charge the greater part of the property included in it, was to that extent invalid, relied upon a charge effected in a prior paid off mortgage to another mortgagee of the same property. The balance due for the prior mortgage debt had been paid out of the money advanced on the later, and the prior instrument had come into the possession of the present mortgagee.

Held, that it must be presumed, in the absence of any expression of intention to the contrary, that the borrower, who claimed to be the owner of the property which he attempted to charge, intended that the money should be applied in paying off and extinguishing the prior mortgage, there being no intermediate incumbrance. It being, also, presumable that the lender lent the money upon the security of the later mortgage, he did not become entitled to an additional security, merely, because that which he had taken had thus proved invalid in part. *Held*, therefore, that the prior mortgage had been extinguished.

APPEAL from a decree of a Divisional Bench of the High Court (22nd August 1879), reversing a decree of the Subordinate Judge of Bhagalpore (30th June 1877).

The appellant, a mahajan trading by his gomashtas at Bhagalpore, brought the suit, out of which this appeal arose, against two defendants; one being the respondent Bawan Das, mohant of the asthal, or religious institution of Jankinagar, endowed with lands in zillah Purneah; the other being one Mangal Das, who had acted for some years as ám mukhtar, or general agent, of former mohants of Jankinagar.

The principal questions now raised were: First, whether or not a valid mortgage had been made to the appellant of three villages in Purneah, *viz.*, Kunkerghât, Bishenpur Kantahi, and Ganeshiampur Patharghât, belonging either to the institution Jankinagar, or to Bawan Das, as the mohant thereof. Secondly, whether a prior undisputed mortgage of the same property to another person on which the balance due had been paid off out of the money advanced by the appellant, and which was in the possession of the latter, could be held available to charge the property in his favour for so much of the money as had been thus appropriated.

The suit was brought in 1876 to recover from Bawan Das and Mangal Das Rs. 33,989-12-6, made up of Rs. 18,421-7-6, due on a mortgage bond executed by Mangal Das on the 12th May 1872, and of Rs. 15,568-5 due on an account stated in 1873 between the plaintiff's firm and Mangal Das, together with interest on those amounts; also to obtain an order for the sale of the above mentioned villages, together with one-third of another named Puraini Kalán, as having been mortgaged by the instrument of the above date.

The plaintiff obtained a decree in his favour in the Court of first instance. As Mangal Das did not appeal against that decree, it remained in force against him personally, and bound that part of the property which consisted of the third part of Puraini Kalán; that alone, it being in fact the property of Mangal Das himself, being held (on the appeal of Bawan Das) to be subject to the mortgage of 1872. The three other villages above named were held by the High Court (MITTER and TOTTENHAM, JJ.) not to have been mortgaged by Mangal Das, with due authority; and the Court also held that Bawan Das had not been rendered liable as principal.

The following summary of the facts was given in the judgment of the High Court:—

"In the year 1845, the then mohant, Girdhari Das, first opened an account with the plaintiff's *kothi*. The mohant used to remit money to the plaintiff's bank from time to time; the plaintiff, on the other hand, used to pay the Government revenue of estates standing in the mohant's name in the Collector's rent-roll. Girdhari was succeeded by the mohant Jairam Das, who died in 1858. Before his death, Jairam Das appointed Mangal Das, the defendant, as his *am mukhtar*, and appointed Balgobind as his own successor, associating Mangal Das with him as *karpurdaz*, with authority over all affairs and law suits, both of sudder and mofussil.

"After Balgobind became mohant the affairs of the asthal being embarrassed, and a decree having been made against him, a deed of sale, or kobala dated 15th August 1860, purporting to have been executed by him, was registered. This purported to grant the three above named villages to Mangal Das, in whose name an entry of them was made in the Collector's register in place of that

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of the mohant of Jankinagar. In the plaintiff's *kothi* the account, which had been up to that time carried on with Balgobind, were thenceforth, *i.e.*, from September 1861, entered in the books in the name of Mangal Das, who in 1864 purchased Puraini Kalán out of money advanced by the plaintiff, Mangal Das being debited with it by the *kothi*.

"In the execution of the decree against Balgobind certain villages were sold which Mangal Das purchased for Rs. 5,849. In order to raise this amount Mangal Das, on the 2nd July 1869, executed a bond for Rs. 9,000 in favor of one Lachminarain, mortgaging the three villages transferred by the kobala of 15th August 1860, and also Puraini Kalán.

"Balgobind died in October 1869. Immediately after his death, a dispute arose between Mangal Das and one Gorib Das, as to the succession in the mohant's gaddi of the asthal of Jankinagar. As usual, the contest opened with petitions and counter-petitions for certificates under Act XXVII of 1860; Gorib's application being dated the 1st of April 1870, and that of Mangal Das the 21st April 1870. On the 30th November 1870, the certificate case was decided by a Division Bench of the High Court in favor of Gorib Das.

"About this time Mangal Das removed from the asthal of Jankinagar, and set up a new asthal at a place called Alinuggur. In the plaintiff's account-books up to this time, the place of residence of Mangal Das was described to be Jankinagar. But the accounts of the year 1279 (September 1871), describe him to be of Alinuggur, which is retained in the accounts of all the subsequent years.

"On the 19th Bysack 1279, corresponding with the 12th May 1872, there was an adjustment of accounts between Mangal Das and the plaintiff's *kothi*, and the result was, that Rs. 9,358-2-9 were found due to the latter. On the same date, Mangal Das took from the plaintiff's *kothi* Rs. 10,641-13-3 in cash, and for the aggregate amount of Rs. 20,000 executed a bond in favor of the plaintiff. Out of Rs. 10,641-13-3 taken in cash, Lachminarain's bond-debt which had then amounted to Rs. 8,266-8 was paid off. The cancelled bond was made over to the plaintiff, and has been produced by him in the record of this case. The

same four parcels of property which had been hypothecated in Lachminarain's bond, were again hypothecated in this bond.

"On the 9th of August 1872, Gorib Das having been successful in his contest as to the succession in the gaddi of the mohants of Jankinagar, commenced a suit against Mangal Das for the recovery of possession of the four parcels of property hypothecated in Lachminarain's, as well as in the plaintiff's, bond, described in the schedule of the plaint in that suit, as items 1, 2, 3, and 4, and also for seven other parcels, of which the four parcels purchased by Mangal Das in June 1869, mentioned above, formed items of claim Nos. 8, 9, 10, and 11. The Subordinate Judge of Bhagalpore, in whose Court this suit was brought on the 21st of May 1873, dismissed it so far as the aforesaid eight parcels were concerned. Gorib Das died while this suit was pending in the original Court, and the present defendant No. 1, Bawan Das, who succeeded him in the gaddi of the asthal of Jankinagar, was substituted in his place. Against the decree of the Subordinate Judge Bawan Das appealed.

"While this appeal was pending, the accounts between the plaintiff's *kothi* and Mangal Das were again adjusted, and Rs. 8,893, besides the bond-debt, were found due from the latter on the 30th September 1873, corresponding with the 24th Assin 1281. It appears that, in the meantime, in the month of July 1872, Rs. 9,000 had been paid by Mangal Das, between whom and the plaintiff's *kothi* the dealings under *bahi-khata* continued down to the 13th August 1875. And the result of the appeal was that on the 5th September 1874, the High Court reversed the judgment dismissing the suit, and decreed possession of three of the four parcels, *viz.*, the three villages above named to the mohant of Jankinagar. On an appeal to Her Majesty in Council, this was confirmed, Puraini Kalán being found to have been purchased by Mangal Das with money which he had borrowed from the banking firm on his own security, was not taken from him.

"Meantime the present suit had been brought in 1876."

That part of the judgment of the High Court which related to the absence of authority in Mangal Das to bind the lands of the asthal, by the mortgage of 12th May 1872, was as follows:

"It has been contended before us, that the finding of the lower

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Court that the property in dispute is not trust property, is against the weight of evidence. In the view which we take of this case, it is unnecessary to pass any opinion upon this contention. Because, in our opinion, the disputed three parcels of property should not be made liable, whether they constitute trust property or not.

"We shall consider the correctness of the decree, assuming first that the disputed three parcels are not trust property.

"It seems to us that the mortgage lien, which the bond of the 12th May 1872 purports to create, can be conferred only upon either of these grounds, *viz.*, (1) that Mangal Das had at that time full power, as agent of the mohant of Jankinagar, to execute the bond in question; or (2) that the mohants of Jankinagar having, by their conduct, led the plaintiff to believe that Mangal Das was the owner of the hypothecated property, are estopped from repudiating the transaction as not binding upon them.

"Now, as to the first of these grounds. It is not disputed that Mangal Das was appointed *karpurdar* and *mukhtar* by the mohant Jairam Das. Nor can it be questioned, upon the evidence that he was retained in that office by Jairam's successor, Balgobind. But after Balgobind's death in October 1869, it is alleged by the appellant that he was dismissed from that office. That an agent's power generally terminates upon the death of the principal is a proposition which requires no authority to establish. There is nothing on the record which goes to show that the successor of Balgobind re-appointed Mangal Das as his agent. On the other hand, on the death of Balgobind, a contest arose between Gorib Das and Mangal as to the right of succession to the gaddi.

"The Subordinate Judge is of opinion that Gorib Das was bound to inform the plaintiff that Mangal's power had ceased. We do not think that he was under any such obligation. The fact that, in the plaintiff's accounts, since the month of September 1871, Alinugger, instead of Jankinagar, was described to be the place of residence of Mangal, leads to the inference that the existence of an open rupture between him and the mohant of Jankinagar was known to the plaintiff. Then having regard to the fact deposed to by the plaintiff's principal witness, Baijnath Sahai,

that the *kothi* dealt with Mangal Das, not as an agent for any person but as the principal, and also to the fact that the parcels of property in dispute were in possession of Mangal Das, who claimed them as his own, we do not agree with the Subordinate Judge that the circumstance of the Government revenue being paid through the plaintiff's *kothi* and the omission on the part of the mohants of Jankinagar to pay the same, affords any valid ground for concluding that Mangal's agency continued even after the death of Balgobind.

"We are of opinion, therefore, that the plaintiff has failed to establish that, on the 12th May 1872, Mangal Das had any authority to excute the bond of that date so as to bind the mohant of Jankinagar."

The other ground for enforcing the mortgage of 12th May 1872 against the villages, *viz.*, that the plaintiff had been led to believe that they were the property of Mangal Das, was held untenable; because the real nature of the transaction between Mangal Das and the asthal had been fully disclosed to the banking firm. This is set forth in the extract from the judgment of the High Court given by their Lordships.

After finding that Lachminarain's mortgage bond of 2nd July 1869 had been paid off, and that the claim in respect of the balance due on the account down to October 1869, (when Balgobind died) was barred by limitation, the High Court concluded thus:—

"As to the other portion of the claim decreed against the appellant, it seems to us that the reasons upon which the decree of the Subordinate Judge proceeds are not tenable. The amounts in question were not paid by the plaintiff with the object of saving the estates from being sold, nor had he any interest in so saving them. The payments were made as mere advances to Mangal Das, in whose possession these estates were at that time, and who had then set up an independent title in respect of them. One or two instalments have been paid by the plaintiff even after the appellant had recovered possession of the mortgaged property. But when these payments were made, Mangal Das's appeal before the Judicial Committee was pending, and it is evident that they were made on account of Mangal Das."

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"Therefore, as regards the parcels of the mortgaged property, except Purnimi Kalán, the plaintiff's suit cannot be sustained against the appellant, even if they are not trust-property. If they are trust-property, there cannot be any doubt that the plaintiff is not entitled to enforce the lien created by the bond of the 12th May 1872, or recover other advances made by him, because he made no enquiries as to the necessity for the loans."

On this appeal,—

Mr. *J. T. Woodroffe* appeared for the appellant.

Mr. *R. V. Doyne* for the respondent.

The argument for the appellant was that the mortgage bond of the 12th May 1872 should have been held to be binding on the respondent, and also to have created a charge on all the villages comprised in it, on the ground that Mangal Das, when he executed it, had implied authority as agent. The appellant's banking firm had reason to regard him as the manager empowered to deal with the property of the asthal; and the respondent's position, he having been successor, as *chela* of Gotib Das, of the former mohant Balgobind Das, precluded him from disputing his liability as principal in respect of the acts done by the agent, Mangal Das, under an authority given by his, the respondent's, predecessors. The mohants who had followed Balgobind Das in the succession had stood by, with knowledge that advances were made by the banking firm for payment of the revenue upon the villages and similar charges, and Bawan Das could not be allowed, in the admitted absence of express notice of termination of the agency, to allege that the agent's authority had ceased at the date of the mortgage. The evidence had failed to fix the period when this authority had come to an end, and debits to the account of Mangal Das had continued in the books of the firm in respect of payments of which the asthal had obtained the benefit. Reference was made to Act I of 1872, (the Indian Evidence Act) s. 115.

It was further contended that, even if the three villages were not affected by the mortgage executed in 1872, the appellant was entitled to maintain a charge upon them in respect of his connection with the payment of the balance of the mortgage debt due under the instrument of the 2nd July 1809. This prior

mortgage had been paid off out of the advance made by him in 1872, and having come into his possession thereupon, remained available as a security to him in equity for so much of the money raised in 1872 as had been thus appropriated for the payment of the prior charge upon the villages.

Reference was made to *Hooper* v. *Keay* (1); *Thompson* v. *Hudson* (2); *Moran* v. *Mittu Bibee* (3).

For the respondent it was argued, as to the first of the above contentions, that the appellant could not be held to have been misled as to the real position of Mangal Das, in regard to the asthal and its property, at the time of the execution of the mortgage of 1872. The whole of the circumstances attending the substitution of the name of Mangal Das in the books of the firm, and in the Collectorate register, were known to the appellant, who, therefore, could not contend that the respondent was precluded from insisting on the actual state of things. The whole of this argument, however, was disposed of when the fact was regarded that the appellant had not accepted the mortgage of 1872 in reliance upon the agency of Mangal Das. On the contrary, he had chosen to deal with the latter as if he had been owner of the villages, though he had complete knowledge of the facts, and was aware that the three villages in question belonged to the asthal.

In answer to the argument that the mortgage of 2nd July 1869 should be held to constitute a charge for the benefit of the appellant to the amount advanced by him for the payment of it off (but advanced upon another and different security, on different terms), it was insisted that this prior mortgage had been extinguished. The intention of the parties to it had evidently been to extinguish it, for Mangal Das could have had no other object in paying it off.

Mr. *J. T. Woodroffe* replied.

He cited *Broyosoondery Debia* v. *Ranee Luchmee Koonwaree* (4); *In re Hallett's estate* (5); *Madhub Anund Moitro* v. *Gunesh*

(1) L. R. 1 Q. B. D., 178. (2) L. R. 6 Ch. Ap., 329.
(3) I. L. R., 2 Calc., 58.
(4) 15 B. L. R., 176 note; S. C. 20 W. R., 95.
(5) L. R., 13 Ch. D., 696.

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Persad (1); *Kishen Chunder Ghose* v. *Babu Nund Kishor Singh* (2).

Their Lordships' judgment was delivered on a subsequent day (March 15th) by

SIR B. PEACOCK.—This is an appeal from a judgment and decree of the High Court of Judicature at Fort William in Bengal, upon appeal in a suit brought by the appellant against the respondent and Mangal Das, in the Court of the Subordinate Judge of Bhagalpore.

In that suit the appellant sought to recover with interest the sum of Rs. 33,989-12-6, of which Rs. 18,421-7-6 were alleged to be due upon a mortgage bond, dated the 12th of May 1872, and the balance upon a running account from that date to the 13th of August 1875.

The plaintiff, appellant, is a banker, who for many years carried on business at Bhagalpore, not personally, but by means of gomashtas. The respondent, Bawan Das, the defendant No. 1, was the mohant of the asthal, at Jankinagar, in zillah Purneah. He is described in the plaint as *chela*, or disciple of mohant Gorib Das, deceased, and heir of mohant Balgobind Das, deceased.

The plaintiff claimed to recover the whole amount from the two defendants, and an order for auction sale of the property mortgaged and hypothecated under the bond for the satisfaction of the bond money. The property hypothecated by the bond consisted of one-third of mouzah Puraini Kalán, the whole of mouzah Kankerghât, the whole of mouzah Bishenpur Kantahi, and the whole of mouzah Ghuneshyampur Pathurghât, of which the last three mouzahs at the date of the bond were the property of the asthal of Jankinagar, or of the respondent, the mohant thereof.

The case was tried in the first instance by the Subordinate Judge of Bhagalpore, who decreed, amongst other things, in favour of the plaintiff for the amount sued for, with costs and interest at the rate of 6 per cent. per annum, and further ordered that the amount covered by the bond, as well as that portion of the money included in the running account, amounting to Rs. 3,166-11-6,

(1) 1 W. R., 91. (2) Marsh., 651.

expended in payment of the Government revenue, dâk contribution, and road cess be realized from the mortgaged property, and the remaining amount recovered from Mangal Das, the defendant No. 2, alone, who was also declared to be bound to pay the entire amount of the decree.

Mangal Das did not appeal from the decree of the Subordinate Judge, but the respondent mohant Bawan Das appealed to the High Court, who reversed the decree, so far as it affected him, and ordered, amongst other things, that the plaintiff's suit against him be dismissed; and, further, that the three mouzahs, Kankerghât, Bishenpur Kantahi, and Ghuneshyampur Pathurghât were not liable for any portion of the plaintiff's claim.

It having been decided by the High Court, and by Her Majesty in Council, in a suit brought by the present respondent against Mangal Das, that mouzah Puraini Kalân was not the property of the appellant, or of the asthal of Jankinagar, the decree of the High Court was silent as to that mouzah.

The first question in this appeal is, whether the High Court was right in holding, contrary to the opinion of the Subordinate Judge, that the other three mouzahs, in respect of which the decree of the Subordinate Judge was reversed, were not liable to be sold under the mortgage bond of the 12th of May 1872.

A question was raised before their Lordships whether the property of the asthal was inalienable, except for the benefit of the asthal in cases of necessity; but in the view which their Lordships take of the case, it is unnecessary to determine that question. They will therefore do as the High Court did consider the question, assuming, without deciding, that the three mouzahs were not inalienable. In that view of the case the mortgage bond of the 12th of May 1872, which was executed by Mangal Das, and not by the respondent, did not bind the property, unless Mangal Das had authority, as agent of the respondent, or of the asthal, to execute the bond, or the plaintiff was induced by some act or neglect of the respondent, or of the asthal to believe that Mangal had such authority, or that he was the actual owner of the property, and, acting under the belief so caused, dealt with Mangal as such agent or owner.

As regards the agency, it seems clear from the evidence, and

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from the findings of both the lower Courts, that Mangal Das acted as, and was the duly authorized agent of the asthal, and of the mohants thereof, and had the management and control of their property from the time of Jairam up to the time of mohant Balgobind's death, in or about the months of October or November 1869.

It was stated correctly by the High Court that an agent's power generally terminates upon the death of his principal, and their Lordships are of opinion that there is nothing to show that Gorib Das, who succeeded Balgobind, or the respondent who succeeded Gorib, ever re-appointed Mangal Das as agent, or led the defendant to believe that Mangal's agency continued.

The Subordinate Judge says: "It appears that, after the death of Balgobind, a dispute arose as to who was to be his successor. Both Mangal Das and Gorib Das were claimants to the succession, but Mangal failed to establish his claim, and Gorib Das obtained certificate of heirship of Balgobind. Mangal then declared himself to be absolute owner of the properties."

The finding of the High Court is to the same effect. They say that Balgobind died in October 1869, and that the certificate case was decided in favour of Gorib Das, on the 26th of November 1870.

The Subordinate Judge considered that Gorib Das was bound to give notice to the plaintiff that Mangal's authority as agent had ceased, but the circumstances are such as to render it incredible that the bank was not fully aware of Balgobind's death, and of the termination of Mangal's authority. But whether the plaintiff had or had not notice that the agency had ceased, it is clear that he cannot rely upon such want of notice unless he was thereby induced to deal with Mangal as agent. This the plaintiff did not do, for throughout, after the death of Balgobind, he dealt with Mangal as the proprietor of the estates and as a principal, and not as an agent.

It was held by the Subordinate Judge, and contended at the Bar, that the defendant was estopped from showing that the property mortgaged to the plaintiff in 1872 was not then the property of Mangal.

It appears that after Balgobind became mohant, a decree for a large amount was passed against him, and there is on the record a registered deed of sale, dated the 15th August 1860, purporting to have been executed by Balgobind, in favour of Mangal Das, of the three mouzahs which were included in the mortgage bond of 1872, and are the subject of this appeal. As regards two of the mouzahs which were revenue-paying estates, the third Pathurghât Ghuneshyampur, being lakheraj, there was contemporaneously with the deed of sale, a mutation of names, and the name of Mangal Das was substituted in the Collector's register for that of the mohant of Jankinagar. In the plaintiff's *kothi* also the accounts, which had been previously kept in the name of Balgobind, were, in September 1861, opened, and from that time kept in the name of Mangal Das.

The following extract from the judgment of the Subordinate Judge explains the grounds of his decision on this part of the case. He says:—

"It is most true, as alleged by the defendant, that Mangal Das was believed by the plaintiff and his agents to be the absolute owner of the whole properties which belonged to the asthal. But how were they led to believe so, and who made them to believe the same? It was the defendant's ancestor, Balgobind Das, who put Mangal Das into the position of being the true owner of the asthal properties, and allowed him to deal with the plaintiff's firm as such owner. All the properties belonging to the asthal were in his name; he had absolute control over them, and no sort of objection was raised by any member of the asthal to his power; how, then, could an outsider believe him to be otherwise than a true owner of the asthal properties? Under such state of things, I cannot think the defendant can take any advantage of such belief of the plaintiff to deprive him of the money lent to Mangal Das on security of the asthal properties."

That argument of the Subordinate Judge is, in their Lordships' opinion, completely answered by the High Court. They say:—

"Although there is no evidence to show that the bill of sale of the 15th August 1860 was really executed by Balgobind,

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yet from the fact that, shortly after that date, the name of Balgobind was removed from the Collector's register, and that of Mangal Das placed in its stead, and that the accounts in the plaintiff's *kothi* were transferred from one name to the other, it may be reasonably deduced that Balgobind was fully cognizant of the contrivance of putting the mortgaged property in the benami of Mangal Das, to protect it against the claims of a certain decree-holder against himself. But the plaintiff was not misled by this fraudulent device. The witness, Mohan Misser, who was the managing gomashta of the plaintiff's *kothi* at that time, distinctly admits that the real nature of the transaction was fully disclosed to him by Balgobind, when the transfer of names in the accounts was effected at the instance of the latter.

"We are, therefore, of opinion that, so far as the claim relating to the bond is concerned, the grounds upon which the Subordinate Judge thinks that the parcels of mortgaged property in possession of the appellant are liable, are not tenable."

Nor can it be disputed with success, in the face of the evidence of Baijnath Sahai and of Mohan Misser, both gomashtas of the plaintiff, that, although the dealings in the time of Balgobind were with Mangal Das as principal and not as agent, they were merely nominally so, and that the credit was in reality given to the asthal in the name of Mangal Das as trustee and *farzi* for the purpose of concealing the names of the real parties to the transaction.

Mangal was not the real proprietor, and he was not the agent of the defendant No. 1. These facts must have been known to the plaintiff or to his agents after the certificate case when Mangal repudiated the agency, claimed to be the absolute proprietor, and dealt with the property on his own account.

For the above reasons their Lordships are of opinion that the High Court was right in holding that the bond of the 12th May 1872 was not binding upon the asthal or upon the defendant.

It was further contended on the part of the plaintiff that, even if the bond of the 12th May 1872 was not binding upon the defendant No. 1, the plaintiff was entitled to fall back upon the mortgage bond of the 2nd July 1869 in favour of Lachmi-

narain, which was binding upon the asthal and the mohants thereof, inasmuch as it was executed at the time when Mangal was merely the apparent owner for the protection of Balgobind from his creditors, and whilst the relationship of principal and agent existed.

This raises the question whether that mortgage was extinguished when Lachminarain was paid, or was intended to be kept alive for the benefit of the plaintiff. Their Lordships are of opinion that it was extinguished.

It has already been shown that, at the time of the execution of the mortgage of the 12th of May 1872, the relationship of principal and agent which had existed between Mangal and the asthal in Balgobind's time had terminated, and that after Balgobind's death Mangal Das claimed to be the mohant of the asthal in his own right, and the proprietor of the estates. In that mortgage he is described as the proprietor of mouzah Puraini, &c., and after a recital, amongst other things, that he has taken a loan from Mohesh Lal of Rs. 20,000 on interest at 1 per cent. per month, of which the sum of Rs. 8,266-8 was for the payment of the balance of the debt due on Lachminarain's mortgage of 1869, he declares that he will pay in cash, in one lump, the principal with the interest in the month of Jeyt 1280 Fasli, &c., and further, that until the payment of that money he has mortgaged the estates to Mohesh Lal, &c.

There is nothing in the bond, or in the evidence, or even in the surrounding circumstances, to show that Mangal intended to keep Lachminarain's mortgage alive, or that he or the plaintiff intended that the latter should hold that mortgage as an additional security for the loan.

On the 15th of May 1872 the sum of Rs. 8,382, the balance due to the estate of Lachminarain on his mortgage, was paid *through* the plaintiff, and on the deed a receipt for that amount was endorsed in the following words: "Received in full Rs. 8,382 up to the 15th May 1872, through Mohan Misser, gomashta of Babu Mohesh Lal, Mahajun, and returned the bond." The bond was then delivered to the gomashta, and was retained by the plaintiff.

It should be remarked that the mortgage to Lachminarain

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carried interest at the rate of Rs. 1-8 per month, whereas the mortgage to the plaintiff was at the rate of Re. 1 per month. It therefore seems to have been the intention of Mangal to borrow money at 1 per cent. per month, partly to pay off and extinguish the mortgage debt at Rs. 1-8 per cent. per month, which was a charge upon the estate which he claimed in his own right. There was no intermediate mortgage between Lachminarain's mortgage and the mortgage to the plaintiff of 1872. Mangal, if the proprietor of the estate, as he then claimed and was stated in the recitals to be, had no interest in keeping alive Lachminaram's mortgage; on the contrary, it was his interest, and he must therefore, in the absence of any evidence to the contrary, be presumed to have intended, that the mortgage bearing interest at Rs. 1-8 a month should be paid off and extinguished. Nor upon the hypothesis that Mangal was himself the proprietor of the estates had the plaintiff any interest in keeping Lachminarain's mortgage alive, inasmuch as under the mortgage of 1872 he had the security of all the estates included in Lachminarain's mortgage, and it is clear that, even if he had taken an assignment of it, he could not have held it as a security for a higher rate of interest on the new loan than 1 per cent. a month. The only benefit that the plaintiff could have derived from taking an assignment of Lachminarain's mortgage of 1869 was that he might have the benefit of that security if it should turn out that Mangal was not the proprietor of the estates, as he represented himself to be, and, therefore, could not legally charge them. But such an event could not have been contemplated by the plaintiff. It is not probable that Mangal would have admitted his inability to bind the property by the deed of 1872, or would have consented to do anything which could raise a doubt as to his power to bind the property as a security for so much of the Rs. 20,000 as was in excess of the amount secured by Lachminarain's mortgage. Even if he would have consented, it is not probable that the plaintiff would have advanced the full amount of Rs. 20,000 upon the security of the estates if he had had any doubt as to Mangal's title or right to charge them.

In *Adams* v. *Angell* (1) it was held that the question

(1) L. R. 5 Ch. D., 634.

whether a mortgage paid off was kept alive or extinguished depended upon the intention of the parties. The Master of the Rolls, in delivering his judgment, stated that, "in a Court of Equity it has always been held that the mere fact of a charge having been paid off does not decide the question whether it is extinguished. If it is paid off by a tenant for life without any expression of his intention, it is well established that he retains the benefit of it against the inheritance; for, although he has not declared his intention of keeping it alive, it is presumed that his intention was to do so, because it is manifestly for his benefit. On the other hand, when the owner of an estate, in fee, or in tail, pays off a charge, the presumption is the other way, but in either case the person paying off the charge can, by expressly declaring his intention, either keep it alive or destroy it. If there is no reason for keeping it alive, then, especially in the case of an owner in fee, equity will, in the absence of any declaration of intention, destroy it; but if there be any reason for keeping it alive, such as the existence of another incumbrance, equity will not destroy it." Applying that rule to the present case, it must be presumed, in the absence of any expression of intention to the contrary, that Mangal, who, when he borrowed the money to pay off Lachminarain's mortgage, claimed to be the owner of the estate, and was stated on the face of the bond to be so, intended that the money should be applied in paying off that mortgage, and in extinguishing the charge, there being no intermediate incumbrance. Although the money was paid by the plaintiff's gomashta to Lachminarain's estate, it was paid with money borrowed from the plaintiff by Mangal, and for which Mangal was liable to him. The mortgage was therefore paid off by Mangal, and not by the plaintiff.

It must be presumed that, when the plaintiff lent the money to Mangal to pay off the mortgage, he lent it upon the security expressed in the bond, and for which he stipulated. Equity cannot give him an additional security because the security relied upon turns out to be bad, as regards a portion of the lands included in it. If an equitable transfer of Lachminarain's mortgage is held to have been included in the mortgage of 1872, it must be as a security for the whole Rs. 20,000, and thus the

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mortgage at Rs. 1-8 per mensem interest, though intended to be paid off, would be a security for Rs. 20,000 at one per cent. a month, contary to the expressed intention of Mangal to pay it off.

It was contended on the part of the plaintiff that it must have been intended to keep alive Lachminarain's mortgage for the benefit of the plaintiff, because, when he paid the money to Lachminarain's representative, he took possession of and subsequently kept that mortgage deed. Lachminarain's representative was paid by the plaintiff as the banker of Mangal. It was paid, not by the plaintiff as the payer, but through him as the agent of Mangal the payer, and with money lent to Mangal upon the mortgage of 1872. The receipt was written on the mortgage bond in accordance with the terms of the bond, by which it was stipulated that the mortgagor should cause all payments which should be made within or after the stipulated time to be endorsed on the bond, and that besides the payments so endorsed the mortgagor should not claim the benefit of payments made in any other way. It would not have been in the course of business for the plaintiff as Mangal's banker to pay off the mortgage without taking a receipt for the money, or to take a receipt otherwise than by an endorsement on the bond. Having taken that receipt, it was the ordinary course of business for the plaintiff to retain it as a voucher for the payment made by him on behalf of his customer. He could not take, or keep the receipt without taking and keeping the bond on which it was endorsed, and it was therefore necessary for him to take and keep the bond, independently of the course of business, by which an agent paying off a mortgage on behalf of his principal takes back the mortgage on his behalf, instead of leaving it outstanding in the hands of the mortgagee.

Mr. Woodroffe, after the close of his argument, referred to several cases, but none of them show that a mortgage when paid off and intended by the parties to be extinguished is presumed to have been intended to be kept alive.

Another question is whether the plaintiff is entitled to recover the Rs. 5,849 applied out of the moneys raised by Lachminarain's mortgage in purchasing four small properties, which

may be called 8, 9, 10, and 11, and which, by the High Court and by Her Majesty in Council, in a suit brought by the present defendant against Mangal Das, were held to be the property of the asthal, because they were purchased with money raised by the mortgage to Lachminarain. Those four properties were not included in the mortgage of 1872, nor are they included in the suit now under appeal. It is difficult to conceive how, if Lachminarain's mortgage was not kept alive and transferred to the plaintiff as a security for his loan of 1872, the right of Mangal, if he had any, against the asthal in consequence of the application of Rs. 5,849 raised by that mortgage in the purchase of property now held to be that of the asthal, can, in the absence of an express intention to that effect, be presumed to have been included in the mortgage of 1872 as an additional security for the loan of that date. The asthal may be liable to Mangal, but that must depend upon the state of accounts between them, as stated by the Judicial Committee, on the 27th June 1877, in their reasons for the advice given to Her Majesty in Council in the appeal of Mangal Das and the present respondent. Mangal Das claiming to be the proprietor of the estates included in the mortgage of 1872 retained possession and received the profits of those estates, as well as of the four small properties purchased with the Rs. 5,849. Mangal must render his accounts before he can be held to be entitled to any portion of the Rs. 5,849. Unless Mangal's claim against the asthal was included in the mortgage of 1872, and can be held to have been assigned to the plaintiff as a security for the loan, there is no privity between the plaintiff and the defendant No. 1 in respect of the Rs. 5,849.

At all events the plaintiff cannot be entitled to any greater or other rights than those of Mangal in respect of the Rs. 5,849.

It is scarcely necessary to refer to the fact that the plaint does not contain a claim on the part of the plaintiff to recover on Lachminarain's mortgage, or to recover the Rs. 5,849 expended by Mangal in the purchase of the lots above referred to as 8, 9, 10, and 11. This is not a mere technical objection, for, if the claim had been made, or an issue raised relating to it, the defendant No. 1, respondent, might have called witnesses to prove that there was no intention to keep alive Lachminarain's mort-

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gage, or to include it or Mangal's right to the Rs. 5,849, claimed on account of the purchase of lots 8, 9, 10, and 11, in the security to the plaintiff for the loan of Rs. 20,000.

As to the sum of Rs. 3,166-11-6 awarded by the first Court to be realized from the mortgaged estates on account of money expended on account of the payment of revenue, road cesses, &c., on account of the estates, the credit was given to Mangal and not to the plaintiff, and there is no privity between the plaintiff and defendant No. 1 in respect of it. Mangal may possibly be entitled to it, but that must depend upon the state of accounts between him and the asthal, which cannot be taken in the suit now under appeal.

Their Lordships will humbly advise Her Majesty to affirm the decree of the High Court, and to dismiss this appeal. The appellants must pay the costs of this appeal.

Appeal dismissed.

Solicitors for the appellant: Messrs. *Barrow & Rogers.*

Solicitor for the respondent: Mr. *T. L. Wilson.*

APPELLATE CIVIL.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Macpherson.

1883 *July* 23.

KHATIJA BIBI (PLAINTIFF) *v.* TARUK CHUNDER DUTT (DEFENDANT.)

Transfer of case—Civil Procedure Code (Act XIV of 1882), section 23—Practice—Ground for transfer.

Section 23 of Act XIV of 1882 is only intended to provide for those cases where, on the ground of expense or convenience or some other good reason, the Court thinks that the place of trial ought to be changed.

Parties desirous of obtaining the transfer of a case from one forum to another ought clearly to explain to the Court by petition and affidavit what is the nature of the claim and defence; they should further state what are the issues and the evidence required, and then satisfy the Court

* Civil Reference No. 7 of 1883 made by J. Pratt, Esq., Officiating District Judge of Dacca, under s. 23, Civil Procedure Code, for transfer of a case from one Court to another, dated the 18th June 1883.

that, either on the ground of expense or convenience or otherwise, the place of trial ought to be changed.

THIS was a reference under the provisions of s. 23 of Act XIV of 1882.

The defendant in the suit asked that the case might be transferred from the file of the Second Judge of Dacca to that of the Sub-Judge of Furridpore, on the ground that the bulk of the property in suit was situate in Furridpore, and that some of his co-sharers in the ijara were residents of Furridpore, and that it would be inconvenient to take his witnesses to Dacca. The plaintiff among his objections stated that, though the bulk of the property was situate in Furridpore, a portion of it was in Dacca; that the defendant resided at Dacca; and that the witnesses likely to be summoned also resided at Dacca.

Baboo *Akhil Chunder Sen* for the plaintiff.

No one appeared for the defendant.

The order of the High Court (GARTH, C.J., and MACPHERSON, J.) was as follows:—

GARTH, C.J.—We see no sufficient ground for transferring this suit from the Dacca Court to that of Furridpore.

Primâ facie, the plaintiff as the *arbiter litis* has a right to bring his suit in any Court which the law allows; and s. 23 is only intended, as we consider, to provide for those cases, where, on the ground of expense or convenience, or some other good reason, the Court thinks that the place of trial ought to be changed.

If for instance, in this case, the defendant could have shown us that great expense could have been saved, or that the balance of convenience was strongly in favor of the case being tried at Furridpore, we might have thought it right to grant his application. But looking at the allegations on both sides, we think it very difficult to say where the balance of convenience lies.

The plaintiff, on the one hand, says that, though a great part of the property in suit is in Furridpore, some of it is in Dacca; that the defendant himself lives at Dacca, and carries on business

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there; and that all the witnesses who are likely to be summoned in the case reside at Dacca.

The defendant, on the other hand, says that the bulk of the property in suit is situated in Furridpore; that some of the persons who are co-sharers with him in the ijara, and who ought, therefore, to have been made parties to the suit, reside at Furridpore; and that it would be very inconvenient to bring the necessary evidence relating to the estate to Dacca.

It would seem from those counter allegations that, notwithstanding all the defendant says, the balance of convenience may be in favour of the case being tried at Dacca. It certainly does not follow that, because the bulk of the land in suit may be at Furridpore, and that some of the co-sharers may live there, the balance, either of convenience or of expense, is in favour of trying the case there.

Parties who desire to have a case transferred from one forum to another ought clearly to explain to the Court by petition and affidavit what is the nature of the claim and defence, and what the issues are; they should state what evidence will be required, and then satisfy the Court that, either on the ground of expense or convenience or otherwise, the place of trial ought to be changed.

Application dismissed.

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——— **tenant without consent.** *See* LANDLORD AND TENANT ... 526
Appeal. *See* APPELLATE COURT, POWER OF 635
——— *See* JURISDICTION 288
——— *See* LETTERS PATENT, CL. 15 ... 482
——— *See* LIMITATION ACT, 1877, ART. 179 100
——— *Administration Suit—Order directing an account—Civil Procedure Code (Act X of 1877), s. 244.*] An order directing an account is not an order in the nature of a final decree, and is unappealable; such an order merely directs certain proceedings to be taken, in order that a final decree may thereafter be made. SREENATH ROY *v.* RADHANATH MOOKERJEE 775
——— *Arbitration, Reference to—Award—Decree confirming award.*] Where an award, *i.e.*, a legal award, has been made, and judgment is passed in accordance therewith, the judgment is final; but where a question arises whether the award is a legal award or not, an appeal lies from a judgment of a Court passed in accordance with such award. DEBENDRA NATH SHAW *v.* AUDHOY CHURN BAGHI... 905
——— *Civil Procedure Code, 1877, s. 588—Order of single Judge of High Court.*] Section 588, Act X of 1877, restricting appeals against orders, does not apply to prevent an appeal to the High Court from the order of a Judge of that Court. HURRISH CHUNDER CHOWDHRY *v.* KALISUNDERI DEBI ... 482
——— *Decision of Bench of Magistrates—Criminal Procedure Code, 1872, ch. XVIII.*] No appeal lies to a District Magistrate from the decision of a Bench of Magistrates composed of an Assistant Magistrate with second class powers and two or more Honorary Magistrates, in a case tried under chap. xviii of the Criminal Procedure Code. IN THE MATTER OF THE PETITION OF HAVALDAR ROY ... 96

Appeal—*Dismissal of Suit—Summons, Non-service of—Civil Procedure Code (Act X of 1877), ss. 97, 588.*] An order under s. 97 of the Civil Procedure Code, dismissing a suit on it being found that the summons has not been served on the defendant, in consequence of the failure of the plaintiff to pay the Court-fee leviable for such service, is not appealable. LUCKY CHURN CHOWDHRY v. BUDURRUNNISSA 627

——— *Execution of Decree—Stay of Execution, Appeal from Order granting—Civil Procedure Code (Act X of 1877), s. 243.*] A decree-holder having attached the property of his judgment-debtor in execution, the latter applied for a stay of execution until the decision of a pending suit brought by him against the judgment-creditor. The Court allowed the application, continuing the attachment on the property, and struck the execution-case off the file. The decree-holder applied to the High Court. *Held*, that no appeal lay. NIHAL CHAND, *alias* CHUTTO LAL v. RAMESHARI DASSEE 214

——— *Failure to produce evidence at hearing.*] At the hearing of a suit a party, though he had sufficient warning of what was necessary, did not take the proper steps to cause the production of the documentary, and only admissible, evidence of a material fact which had to be proved by him; and the decision was against him. The record of another proceeding would, it was said, have supplied this evidence; and an application had been previously made on which the order of the Judge was that "the matter would be decided when the case was tried, and the record would be sent for, if necessary." No further application to the Court was made, and no attempt to supply this evidence. *Held*, that if there had been, as there might have been, an oversight by the party in not calling the attention of the Judge to the above order, and in not tendering the evidence, there had been no omission on the Judge's part affording ground for appeal. CHANDICHURN SHASHMAL v. DURGA CHURN MIRDUA 260

——— **in Criminal Case**—*Criminal Procedure Code (Act X of 1872), s. 36, (Act X of 1882), s. 408—Effect of Repeal of Act.*] On the 9th of December 1882, a person was convicted under ss. 457 and 109 of the Indian Penal Code, and sentenced to three years' rigorous imprisonment by a Deputy Magistrate in Assam, exercising special powers under s. 36 of the old Code of Criminal Procedure, Act X of 1872. The new Code of Criminal Procedure came into force on the 1st of January 1883. The prisoner presented an appeal to the High Court from the conviction and sentence above mentioned on th 23rd of January 1883. *Held*, by FIELD, J. (MITTER, J., expressing no decided opinion) that the case was governed by s. 408 of the new Code of Criminal Procedure, and

Appeal in Criminal case—*continued.*
that no appeal lay to the High Court. RONGAI AND OTHERS v. THE EMPRESS ... 513

——— *Security for good behaviour—Code of Criminal Procedure (Act X of 1882), s. 123.*] No appeal lies to the High Court from an order passed by a District Magistrate under the provisions of s. 123 of the Criminal Procedure Code, and on reference by the Magistrate confirmed by the Sessions Judge under the same section, requiring a person to be detained in prison, until he should provide security for his good behaviour. CHAND KHAN v. THE EMPRESS 875

Appeal partly successful. *See* COSTS ... 797

———, **Right of.** *See* BENGAL ACT, VIII OF 1869, s. 102 596

———, **Withdrawal of.** *See* PRACTICE 788

Appellate Court. *See* LIMITATION ACT, 1877, ART. 179 100

Appellate Court. Objection taken for the first time in.] In a suit for maintenance, the amount of which had been fixed by agreement, an objection taken on appeal, that the suit should have been brought on that agreement, *held*, taken too late; the defendant having been made aware of the agreement at the hearing, and not having objected on this ground in the first Appellate Court. AHMAD HOSSEIN KHAN v. NIHALUDDIN KHAN ... 945

———, **Power of.** *See* PARTIES 355

——— *Limitation Act XV of 1877, s. 4—Appeal—Question of limitation not raised in cross appeal.*] On an application for execution of decree the application was granted, but the interest claimed by the decree-holder on the amount of the decree was disallowed. The decree-holder appealed from the order, but the judgment-debtor filed no cross appeal. On the hearing of the appeal the application for execution was dismissed, on the ground that the execution of the decree was barred by limitation. *Held*, that under the circumstances of the case, the Appellate Court was not competent to take the question of limitation into consideration. *Alimannissa Khatoon* v. *Syed Hosein Ali*, 6 C. L. R., 267, followed. RUGHU NATH SINGH MANKU v. PARESHRAM MAHATA 635

Application to file award. *See* ARBITRATION 557

Apportionment of Mortgage debt. *See* MORTGAGE 406

Appropriation of payments, Agreement for. *See* NAWAB NAZIM'S DEBTS ACT... 914

Approval of Court. *See* COMPROMISE OF SUIT 810

Arbitration. *See* APPEAL 905

——— *Award—Application to have an award filed in Court—Private arbitration—Civil*

Arbitration—*continued.*

Procedure Code (Act X of 1877), ss. 525, 526.] Where an application is made under s. 525 of the Code of Civil Procedure to have an award filed in Court, and it appears to the Court, on cause shown, why the award should not be filed, that there is a reasonable dispute between the parties on any of the grounds mentioned in ss. 520 or 521, the application should be dismissed. Under s. 525 of the Code of Civil Procedure, sufficient cause may be shown by affidavit or verified petition. *Sree Ram Chowdhry* v. *Donobundhoo Chowdhry*, I. L. R., 7 Calc., 490; and *Shashi Charan Chatterjee* v. *Tarak Chandra Chatterjee*, 8 B. L. R., 315, referred to. ICHAMOYEE CHOWDHRANEE v. PROSUNNO NATH CHOWDHRI 557

———*Award—Time to file an award—Limitation Act (XV of 1877), Sch. II, Art. 176—Civil Procedure Code, 1877, ss. 525, 526—Powers of Court—Cause shown against filing award, Validity of—Powers of Arbitrators—Review of Award.*] Where an award was made and signed by the arbitrators on the 5th of August 1881, but was not delivered to the parties till the 18th of September following, *semble*, that an application to file the award, made on the 25th of February 1882, under the provisions of s. 525 of the Code of Civil Procedure, was not barred by limitation. It is clearly the intention of the Legislature that a party to an arbitration should have six months to enforce the award, under s. 525 of the Code of Civil Procedure, from the time when he is in a position to enforce it. Under ss. 525 and 526 of the Code of Civil Procedure, the Court has full power to enter into the question of the sufficiency of the cause shown against the filing in Court of an award. *Dandekar* v. *Dandekars*, I. L. R., 6 Bom., 663, followed; *Ichamoyee Chowdranee* v. *Prosunno Nath Chowdhri*, *ante*, p 557, dissented from. After an award has been made and handed to the parties the functions of the arbitrators cease. They have no power afterwards to deal with an application for review of their decision. IN THE MATTER OF THE PETITION OF DUTTO SINGH. DUTTO SINGH v. DOSAD BAHADUR SINGH 575

———*Validity of Award—Absence of some of the Arbitrators.*] A case was referred to the arbitration of five persons, with a proviso that in the event of any two of the arbitrators being absent, the arbitration should be continued by the other three. Two of the arbitrators named were the pleaders on either side, and these two, with the consent of the parties, ceased to act as arbitrators, but argued the matter before the other arbitrators. *Held*, that the award made by the other three arbitrators named was a valid award. DEBENDRA NATH SHAW v. AUBHOY CHURN BAGCHI 905

———**Arbitrators, Absence of.** *See* ARBITRATION 905

Arbitrators, Powers of. *See* ARBITRATION 575

Arrears of Rent, Suit for. *See* LIMITATION 255

Articles of Association, Borrowing in excess of power given by. *See* COMPANY 14

Assam. *See* RIGHT OF OCCUPANCY ... 330

Assessors, Delivery of opinions of. *See* CRIMINAL PROCEDURE CODE, 1882, s. 309 875

Assessors, Trial by. *See* CRIMINAL PROCEDURE CODE, 1882, s. 309 ... 875

Assignment by Minor. *See* LIMITATION ACT, 1877, s. 7 643

———**of Agreement to Mortgage.** *See* PRINCIPAL AND SURETY ... 355

Attached property, Stay of sale of. *See* CIVIL PROCEDURE CODE, 1877, s. 326 290

Attachment. *See* RIGHT OF SUIT ... 10

——— *See* SALE IN EXECUTION OF DECREE 386

———**by Magistrate.** *See* ABSCONDING OF ACCUSED 861

———**and sale liability to.** *See* JAGHIR 187

Alteration of Will. *See* WILL ... 226

Award. *See* ARBITRATION ... 557, 575

———**Decree confirming.** *See* APPEAL 905

———**Validity of.** *See* ARBITRATION 905

Banker and Customer. *See* PRINCIPAL AND AGENT 880

Bench of Magistrates, Decision of. *See* APPEAL 96

———, **Power of**—*Bengal Act V of 1876, ss. 215, 216—Omission to remove Obstruction.*] A notice was issued under s. 215 Bengal Act V of 1876, requiring *A* to remove an alleged obstruction. The requisition was not complied with, and *A* was prosecuted for non-compliance therewith, under s. 216, before a Bench of Honorary Magistrates. *Held*, that the Court had power to inquire whether the alleged obstruction was, in point of fact, an obstruction or not. IN THE MATTER OF THE MUNICIPAL COMMITEE OF DACCA ... 86

Benefit to arise out of land. *See* JURISDICTION 535

Bengal Act VII of 1868, s. 8. *See* SALE FOR ARREARS OF REVENUE 271

——— VIII of 1869, s 4. *See* LANDLORD AND TENANT 252

——— VIII of 1869, ss. 6, 22 and 52. *See* RIGHT OF OCCUPANCY ... 804

Bengal Act VIII of 1869, s. 14.
See LANDLORD AND TENANT ... 72

——— s. 27.
See LIMITATION ... 280, 423

——— s. 27—*Landlord and Tenant—Suit under Act X of 1859—Breach of Contract in planting trees in land let for agricultural purposes.*] Section 27 of Bengal Act VIII of 1869 only relates to such suits as could be brought either by the landlord or tenant under Act X of 1859, and will not apply to an alternative claim, put forward in a suit for ejectment, to compel the defendant to remove trees from certain lands leased to him for agricultural purposes. GUNESH DASS *v.* GONDOUR KOOMRI 147

——— s. 29.
See LIMITATION 255

——— s. 30.
See LIMITATION 211

——— s. 32—*Parties—Principal and Agent—Plaintiff—Gomashta.*] Under s. 32 of Bengal Act VIII of 1869 a gomashta has no right to bring a suit in his own name. He can only sue in the name of his employer, and conduct the suit for him like any other agent. KOONJO BEHARY ROY *v.* POORNO CHUNDER CHATTERJEE ... 450

——— s. 52.
See LANDLORD AND TENANT ... 808

——— s. 52—*Covenant to forfeit Lease if Rent be unpaid—Payment of Rent after Suit but before Decree—Relief against Forfeiture—Landlord and Tenant.*] Section 52 of Bengal Act VIII of 1869 is applicable both to cases where the right to cancel a lease arises under the provisions of the Act, and to cases where the right arises under agreement between the parties. But the object of the section being to prevent a forfeiture if the rent be paid within the time specified by the section, the Courts will grant relief against a forfeiture where the rent is so paid. DULI CHAND *v.* RAJKISSORE 88

——— s. 53.
See LIMITATION ... 380, 711

——— ss. 59 and 60.
See INSOLVENCY 855

——— ss. 59 and 69.
See SALE FOR ARREARS OF RENT 641, 683, 722

——— s. 66.
See SALE FOR ARREARS OF RENT ... 683

——— s. 102—*Practice—Appeal, Right of—Second Appeal*] In a suit for arrears of rent and ejectment the right of appeal is taken away by s. 102, Bengal Act VIII of 1869, only when it is shown that the amount sued for and the value of the property claimed is less than Rs. 100. Unless that fact appears either from the finding of the District Judge or elsewhere upon the proceedings, the High Court has no right to draw any inference to that effect. TULSI PANDAY *v.* BUCHU LALL 596

Bengal Act X of 1871. *See* ROAD CESS ACT 1871.

——— V of 1876, ss. 215, 216.
See BENCH OF MAGISTRATES, POWER OF 83

——— VII of 1876, s. 55.
See EVIDENCE ACT, s. 35... ... 431

——— s. 78.
See LANDLORD AND TENANT ... 517

——— VIII of 1876, s. 10.
See PARTITION 244

——— VII of 1878. *See* BENGAL EXCISE ACT, 1878.

——— **Excise Act** (VII of 1878), ss 53, 60, 61—*Sale by servant of licensed Vender—Cooly employed by servant.*] The servant of a licensed vendor sold eight quart bottles of country spirit, and employed a cooly to carry them as he directed. The servant was convicted under s. 60, Bengal Act VII of 1878; and the cooly was convicted under s. 61 of the same Act. It was suggested that the servant should have been convicted under s. 53, and that the cooly had committed no offence. *Held*, that the conviction of the cooly was illegal, and must be set aside. *Held*, also, that the servant was properly convicted, and whether under s. 60 or s. 53 was immaterial. *Queen* v. *Ishan Chunder Shaha*, 19 W. R. Cr., 34; and *Empress* v *Haney Mudhub Shaha*, I L. R., 8 Calc., 207: 10 C. L. R., 389, followed. EMPRESS *v.* ISHAN CHANDRA DE 847

——— s. 61—*Imported Liquor, Possession of—Consignee—Agent.*] Certain liquors arrived in Calcutta *per* S.S. *Nasarino* consigned to *M. & Co.* at Agra, who requested *A* to pay on their behalf the duty and landing charges, and forward the goods to Agra. While on the way from the steamer to the railway station, the goods were seized as being in the possession of *A* without a pass, within the meaning of s. 61 of Bengal Act VII of 1878, and *A* was convicted and sentenced to a fine under the provisions of that Act. *Held*, that the conviction was bad. IN THE MATTER OF THE PETITION OF KYTE 223

Bhowli Tenures. *See* ROAD CESS ACT, 1871, ss. 5 and 7 62

Bill of Exchange. *See* PRINCIPAL AND AGENT 880

Bond. *See* REGISTRATION ACT, 1877, s. 49 520

——— **of indemnity.** *See* PRINCIPAL AND SURETY 355

Breach of Contract. *See* INTEREST ... 689

Breach of Contract in planting trees in land let for agricultural purposes. *See* BENGAL ACT VIII of 1869, s. 27 ... 147

British India. Offence committed out of. *See* JURISDICTION 288

Brother's daughter's son. *See* HINDU LAW, INHERITANCE 563

Buildings. Erection of. *See* CRIMINAL PROCEDURE CODE, 1882, s. 133 ... 637

Cantonments Act. 1864, s. 11
See LIABILITY OF PUBLIC SERVANT 341

Cause shown against filing award. *See* ARBITRATION 575

——**of action.** *See* CIVIL PROCEDURE CODE, 1859, s. 7. 283

—— *See* LIMITATION ACT, 1887, ARTS. 139, 144... 367

—— *See* RIGHT OF SUIT ... 10

—— *See* SALE IN EXECUTION OF DECREE 688

—— *Jurisdiction—Promissory Note—Place of Performance of Contract—Code of Civil Procedure (Act X of 1877), s. 17, Illus.*] Where a promissory note is executed in one district, and it is agreed that the amount of the note shall be paid in another, the Courts of the latter district have jurisdiction to entertain a suit on the note. The illustrations to s. 17 of the Code of Civil Procedure afford no safe guide as to what is meant in the Code by the term 'cause of action.' *Gopi Krishna Gossami* v. *Nil Komul Banerjee*, 18 B. L. R., 451; S. C., 22 W. R., 79; *Mahomed Abdul Kadar* v. *E. I. Ry. Co.* I. L. R., 1 Mad., 377; and *Vaughan* v. *Weldon*, L. R., 10 C. P., 48 approved. LALJEE LALL v. HARDEY NARAIN 105

Certificate of administration. *See* ACT XL of 1858, s. 3 901

——**guardianship.** *See* MAHOMEDAN LAW, GUARDIAN 599

——**sale.** *See* SALE FOR ARREARS OF RENT 641

—— *See* SALE IN EXECUTION OF DECREE 842

Cess. Suit to recover road and public works. *See* SMALL CAUSE COURT, MOFUSSIL 183

Charge on property. *See* SALE IN EXECUTION OF DECREE 406

Civil Procedure Code (Act VIII of 1859), ss. 7, 8, 9, 10)—*Cause of action, Including whole claim arising out of—Mesne profits, Suit for—Possession, Suit for.*] Under s. 7, read with ss. 8, 9, and 10 of Act VIII of 1859, a plaintiff suing for mesne profits of land is not precluded from afterwards maintaining a suit for possession of such land. *Pratap Chandra Burua*

Civil Procedure Code—*continued.*

v. *Rani Swarnamayi*, 4 B. L. R., F. B. 113, commented on. MONOHUR LALL v. GOURI SUNKUR 283

——— 1859, s. 246.
See LIMITATION ACT, 1871, ART. 15 ... 43
See LIMITATION ACT 1877. ART. 11 ... 230
See LIMITATION ACT 1877, ARTS. 11 & 120 163
See RES-JUDICATA 163

——— ss. 246 247.
See RIGHT OF SUIT 10

——— s. 259.
See REGISTRATION ACT 1871, s. 17 ... 82

——— ss. 284, 294.
See SUPERINTENDENCE OF HIGH COURT 295

——— 1877, s. 13.
See RES-JUDICATA.

——— s. 17.
See CAUSE OF ACTION 105

——— s. 30—
Practice—Leave to sue—Suit by one creditor on behalf of others.] A suit by one or more creditors on behalf of other creditors cannot be entertained without the leave of the Court being obtained for its institution. Such leave cannot be granted at the hearing. THE ORIENTAL BANK CORPORATION v. GOBIND LALL SEAL 604

——— s. 108.
See PARTIES 271

——— s. 43,
Splitting claims.] On the 27th Joist 1286 F. S. (2nd June 1879) the plaintiff brought a suit to recover damages for the breach of a contract on the part of the defendant, for not having made over possession to him of certain leasehold properties, the damages claimed being for the profits accrued due for the year 1283 F. S. (1875-6). In this suit he obtained a decree. On the 21st Joist 1287 F. S. (14th June 1880), the plaintiff brought another suit against the defendant to recover damages for the profits accrued for the years 1284, 1285, and 1286, F. S. (1876-7 to 1878-9). *Held*, that the plaintiff should have included the damages for the years 1284 and 1285 (1876-7 and 1877-8) in his former suit, and that he was debarred by s. 43 of Act X of 1877 from including in his second suit any portion of his claim for damages which had accrued due at the time of the institution of his first suit, and for which he had omitted to sue; but that he was entitled to recover damages for the year 1286 (1878-9). *Taruck Chunder Mookerjee* v. *Panchu Mohini Debya*, I. L. R., 6 Calc., 791, followed SHEO SHUNKUR SAHOY v. HIRDOY NARAIN 143

Civil Procedure Code, 1877, s. 97
See APPEAL 62

Civil Procedure Code, s. 103—*Suit brought after dismissal of former Suit for non-appearance.*] *Per* GARTH, C.J.—The operation of s. 103 of the Code of Civil Procedure is confined to those cases only where a second suit is brought for the same object and cause of action as the suit which is dismissed. GOBIND CHUNDER ADDYA *v.* AYZUL RABBANI ... 426

——————, s. 108.

See LIMITATION ACT, 1877, ART 164... 869

——————, ss. 223, 228.

See SUPERINTENDENCE OF HIGH COURT 295

——————, s. 243

See APPEAL 214

——————, s. 244.

See APPEAL 773

——————, s. 246.

See SET-OFF 479

——————, s. 266.

See SALE IN EXECUTION OF DECREE... 511

——————, s. 266, cl. (c.)

See SALE IN EXECUTION OF DECREE 595

——————, ss. 280, 282.

See LIMITATION ACT, 1871, ART. 15 ... 43

——————, s. 283.

See LIMITATION ACT, 1877, ART. 11, 120. 163

——————, s. 293.

See SALE IN EXECUTION OF DECREE 98

——————, s. 295.

See SALE IN EXECUTION OF DECREE... 920

——————, s 311.

See SALE IN EXECUTION OF DECREE... 656

——————, s. 313.

See SALE IN EXECUTION OF DECREE. 217 506

——————, s. 326—*Scheme for satisfying decree—Stay of public sale of attached property.*] Where the Collector has applied to the Court under s. 326 of the Civil Procedure Code, proposing a scheme for the payment of decretal money in order to avoid a sale of attached property, it is in the discretion of the Court to authorize the Collector or not, as it thinks fit, to provide for the satisfaction of the decree in the manner proposed; and the Court is bound to hear any objections which may be made by the decree-holder to the feasibility of the proposed scheme, and any evidence that may be offered. In support of those objections; and if after hearing the decree-holders' objections, and the evidence which may be offered, in support of them, the Court is not fully satisfied that the proposal is feasible, or that it can, in all reasonable probability, be carried out within the specified period, the Court ought, in the exercise of its discretion, to refuse its sanction. HURO PROSAD ROY *v.* KALI PROSAD ROY 290

Civil Procedure Code, ss. 371, 397.

See RES-JUDICATA 163

——————, s. 424.

See PARTIES 271

——————, s. 489.

See JURISDICTION 535

——————, ss. 525, 526.

See ARBITRATION ... 557, 575

——————, s. 559.

See PARTIES 355

——————, s. 581.

See APPEAL 482, 627

——————, s. 610—*Transmission for execution of Order, of Her Majesty in Council—Evidence of such order.*] The provisions of Act X of 1877, s. 610, are not to be construed as restricting the only admissible evidence of an order of Her Majesty in Council to a certified copy, on an application for execution made under that section. They must be read as directory, having the object that proper information regarding the order shall be supplied to the Courts in India. Where the original order (given, according to the practice in England, to the successful party, or to one of such parties) had not been filed in the High Court, so as to enable the proper officer to supply a certified copy; *Held*, that a copy, though not certified by him, might accompany a petition for execution under s. 610. HURRISH CHUNDER CHOWDHRY *v.* KALISUNDERI DEBI ... 482

——————, s. 630.

See REVIEW 209

——————, 1882, s. 11.

See POSSESSION, SUIT FOR... ... 602

——————, s. 16.

See SERVICE OF SUMMONS ... 733

——————, s. 23.

See TRANSFER OF CASE 980

——————, s. 32.

See PRACTICE... 735

——————, ss. 42, 43—*Enhancement of rent, Suit for—Subsequent suit for rent.*] Under ss. 42 and 43 of the Civil Procedure Code, plaintiffs must bring their entire claim and every remedy enforceable in respect of that claim into Court at once, and if they fail to do that in any suit, they cannot afterwards avail themselves of any remedy on which they have not chosen to insist in the first suit. Suits for enhanced rent, and suits for rent, are claims arising in respect of the same subject-matter, and a plaintiff cannot be allowed, after having unsuccessfully sued for rent at an enhanced rate, to sue for the original rent for previous years. KUNNOOK CHUNDER MOOKERJEE *v.* GURU DASS BISWAS 919

——————, s. 136.

See PRACTICE 923

——————, ss. 231, 244, 258. *See* EXECUTION OF DECREE ... 831

Civil Procedure Code 1877, s. 244, cl. (c) —*Question relating to the execution of Decree —Separate Suit.*] In a suit to recover possession of land, the defendants resisted execution on the ground that they were cultivators, and that the decree only authorised the plaintiff to recover possession as proprietor.

The objection was overruled, and the defendants were ejected. They then sued to set aside the order made in the execution proceedings and to recover possession. *Held*, that the suit was barred under s. 244, cl. (c.), of the Civil Procedure Code. NAJHAR *v.* MAHOMED TAKI KHAN *alias* PEER BUX KHAN 872

——————, s. 283

—*Hindu Law, Alienation—Mitakshara—Mortgage by father—Liability of sons not made parties.*] The *L* Bank advanced money to *C*, a Hindu governed by the Mitakshara school of law upon mortgage of ancestral property. *S*, who was stated to be *C*'s only son, joined in the mortgage. Subsequently the Bank obtained a decree against *C* and *S* for the amount due on the mortgage. On attempting to sell the mortgaged property other sons of *C* objected. This objection was allowed, and the mortgagees referred to a regular suit. They then sued all the sons of *C* to establish their lien on the mortgaged property. *Held*, that the suit was maintainable under s. 283 of the Civil Procedure Code. *Nuthoo Lall Chowdhory* v. *Shooker Lall*, 10 B. L. R., 200; and *Musamut Dhare* v. *Hurry Prosad*, unreported, distinguished. SITANATH KOER *v.* LAND MORTGAGE BANK OF INDIA 888

——————, s. 313.

See SALE IN EXECUTION OF DECREE... 626

——————, s. 561

—*Limitation Act XV of 1877, s. 5—Cross Appeal—Notice of Objection.*] A notice of objection under s. 561 of the Code of Civil Procedure, Act XIV of 1882, must be filed not less than seven days before the date (if any) fixed for the hearing of the appeal in the notice served upon the respondent. Section 5 of Act XV of 1877 does not apply to an objection under s. 561 of the Procedure Code. KALLY PROSUNNO BISWAS *v.* MUNGALA DASSEE... 631

Claim to compel removal of trees from land granted for agricultural purposes. *See* LIMITATION ACT, 1877, ART. 120 147

Co-defendants. *See* RES-JUDICATA ... 120

Commission. *See* EVIDENCE TAKEN ON COMMISSION 939

Commissioner, Jurisdiction of. *See* NAWAB NAZIM'S DEBTS' ACT 704

——————**beyond Jurisdiction** *See* EVIDENCE TAKEN ON COMMISSION ... 939

Commitment Application to quash. *See* HIGH COURT'S CRIMINAL PROCEDURE ACT, ss. 14 and 147 397

Company—*Articles of Association—Power to borrow—Borrowing in excess of Power in Articles of Association—Ratification.*] Under the articles of association of a limited company, the directors had power, from time to time as they might see fit, without any previous consent of the shareholders, to borrow any sum of money not exceeding Rs. 50,000, on the bill, bond, note, or other security of the company, upon such terms as they might think proper; and had power, with the sanction of a special resolution of the company previously obtained at a general meeting, to borrow any sum of money not exceeding in the whole, together with the Rs. 50,000, the sum of Rs 1,00,000. *K.* advanced sums of money to the company amounting in 1879 to over Rs. 80,000. No previous sanction was given to any of these advances. On the 4th October 1879, an extraordinary general meeting of shareholders was held, at which a resolution was passed sanctioning a mortgage to *K.* of the whole of company's property, except a certain garden, to secure the payment of a sum, not exceeding Rs 1,00,000, for advances already made and to be made, with interest at 7 per cent. This resolution was confirmed on the 16th of October, and the mortgage was executed on the 22nd of December 1879. Subsequently the company was ordered to be wound up, and *K.* advanced a claim for Rs. 1,20,787:—*Held*, that there is a distinction between loans which a company is empowered to raise under its borrowing powers, and debts which, in meeting its current liabilities and in the actual carrying on of its affairs, the company, or its agents on its behalf, have contracted; and that the advances made by *K.* did not amount to a borrowing within the meaning of the articles of association. *In re Cefn. Cilcen Mining Company* and *Waterlow* v. *Sharp* followed. *Held*, also, that the borrowing powers conferred by the articles of association justified a mortgage, the object of which was in part to cover previously incurred liabilities. IN THE MATTER OF THE INDIAN COMPANIES' ACT OF 1866 AND OF THE MEDLA TEA CO., LIMITED 14

Compensation, Dispute as to right to. *See* LAND ACQUISITION ACT, ss. 15 AND 39 838

——————**in lieu of rent.** *See* LANDLORD AND TENANT 908

Competent Court. *See* RES-JUDICATA... 439

Compromise by Hindu Widow, Suit to set aside. *See* HINDU LAW, REVERSIONER 817

——————**of Suit**—*Suit by minor—Approval of Court.*] Where a compromise of a suit is entered into on behalf of an infant defendant, the approval of the Court to such compromise must be express, and will not be inferred from the subsequent passing of a decree in terms of such compromise. Without such approval, the compromise will not bind

Compromise of Suit—*continued.*
the infant, and will be set aside at his instance. *Rajagopal Tukkaya Nathar* v. *Subramanya Ayyar*, 1 L. R., 3 Mad., 108, cited and followed. SHARAT CHUNDER GHOSE v. KARTIK CHUNDER MITTER 810

Conditional Sale. *See* EVIDENCE ACT, s. 92 898

Conduct of parties. *See* EVIDENCE ACT, 1872, s. 92 528

Confirmation of Sale. *See* SALE IN EXECUTION OF DECREE 842

Consent, Evidence of. *See* HINDU LAW, WIDOW 463

Consignee. Liability of. for possession of liquor. *See* BENGAL EXCISE ACT, 1878, s. 61 223

Contract. *See* HINDU LAW, CONTRACT 825, 871

———, **Admissibility of evidence to vary.** *See* EVIDENCE ACT, 1872, s. 92 528

——— **Breach of.** *See* INTEREST ... 679

———*Construction of Contract—Printed form of Contract—Writing and Printing—Sale of Goods to arrive*] The defendants contracted to purchase certain piece goods from the plaintiffs, who were dealers in those goods The contract of sale was written out on one of the printed forms of the plaintiff's firm, which forms contained in print, the words "now in course of landing or in the said godowns" and "now on board ship." As a matter of fact, well known to both parties, the goods contracted for were neither in the godowns nor on board ship *Held*, that under the circumstances, the printed words above set out formed no part of the contract entered into between the parties CARLISLES, NEPHEWS AND Co v HURMOOK ROY 679

———*Sale of Goods—Delivery by instalments—Tender.*] A contract made between the plaintiffs and the defendant stipulated for the delivery to the defendant of 7,500 bags of Madras Coast castor seed, which were to be shipped "per steamers," and then stated that shipment of 2,500 bags was to be made in December. On the 12th December 1,690 bags arrived by Steamer "Shahjehan," and notice in writing was given to the defendant, who requested that the delivery might be postponed owing to his not having godown room On the 14th December the defendant refused to take the 1,690 bags, on the ground that he was not bound to take a portion of the 2,500 bags, but only the whole at one time. On the 16th December the defendant tendered the value of 2,500 bags which was refused, and on the same day the plaintiffs resold the 1,690 bags On the 17th December the plaintiffs informed the defendant that 810 bags, the balance of the 2,500 the December shipment, were due on the 18th, and they did arrive on the 19th, but were

Contract—*continued.*
refused by the defendant on the same ground as before, and they were accordingly resold by the plaintiffs. *Held*, that according to the terms of the contract there was a legal and proper tender of the December shipment by the plaintiffs, and that the defendant having committed a breach of the contract in not accepting the bags, the plaintiffs were justified in reselling them at once and suing for damages. SIMSON v. GOBA CHAND DOSS ... 473

———**Place of performance of.** *See* CAUSE OF ACTION . 105

———**to pay for Excess land after measurement.** *See* LANDLORD AND TENANT 72

———**Act. 1872. ss. 23 and 30.** *See* GOVERNMENT SECURITIES, CONTRACT FOR SALE OF 791

———, s. 74.
See INTEREST 615, 689

Contribution, Suit for. *See* SMALL CAUSE COURT, JURISDICTION OF... ... 395

———*Government Revenue—Payment by one co-sharer for another.*] Where a co-sharer of a portion of a taluok is compelled to pay a quota of the Government revenue due on account of a share not his own in order to save the portion of the taluok from being sold, he is entitled to a charge upon such share for the money so paid, and such share should be charged even when it has passed subsequently into the hands of a third party. *Enayet Hossain* v. *Muddun Mohun Shahoon*, 14 B. L. R., 155 : S. C, 22 W. R., 411 followed. NOBIN CHUNDER ROY v. RUP LAL DAS 377

Conveyance by presumptive heir. *See* HINDU LAW, WIDOW 463

Conviction, Necessity for alteration of. *See* REVISION 847

Cooly employed by Servant to carry liquor. *See* BENGAL EXCISE ACT, 1878, ss. 58, 60, 61 847

Co-sharer, Payment of revenue by one. *See* CONTRIBUTION, SUIT FOR ... 377

Co-sharers. *See* ENHANCEMENT OF RENT, SUIT FOR 864

——— *See* SALE FOR ARREARS OF RENT 722

———, **Alienation by one of several.** *See* LANDLORD AND TENANT ... 526

Costs. *See* MORTGAGE 234

———, *Liability of shares of members of joint-family for.*] Pending an appeal, the plaintiff, who was the appellant, died leaving one adult and four minor sons. The adult son prosecuted the appeal, which was dismissed, as was the suit in the Court below, with costs. The

Costs—*continued.*
decree for costs were sold by the defendant to a third person, who caused certain property which belonged to the estate of the plaintiff to be sold in execution. *Held*, in a suit by the minor sons to recover possession of the shares in the property sold, that as all the sons were interested in the litigation all their shares were liable for the costs, and the suit was dismissed. JUTADHARI LAL v. RUGHOBEER PERSAD 508

———*Set-off of costs ordered on the disposal of a preliminary point against costs awarded at the final disposal of the suit—Costs of partly successful appeal*] It is not the usual practice, when costs of an interlocutory proceeding have been disposed off, to consider that an award of the general costs of the suit interferes with the order as to the partial costs A prior decree having given the costs incurred on the disposal of a preliminary point to the party successfully raising it, a later decree, without expressly referring to the former, gave the costs of the suit, generally, to the opposite side. *Held*, that the costs due under the prior decree should be set off against those due under the later. Although an appellant only partly succeeded in his appeal, the whole of his claim having been opposed in the Courts below on an untenable ground, *Held*, that there was no reason for departing from the general rule that the defeated party should pay the costs RADHAPERSAD SINGH v. RAM PARMESWAR SINGH 797

Court, Discretion of. *See* CRIMINAL PROCEDURE CODE (1872) s. 263 ... 58

Covenant to forfeit Lease if Rent be unpaid. *See* BENGAL ACT VIII OF 1869, s. 52 88

———, **To repay, absence of.** *See* MORTGAGE 234

Creditor of Vendor, Right of. *See* LIEN 167

Criminal Act of Servant. *See* MASTER AND SERVANT 849

Criminal Procedure Code, 1872, Chap. XVII. *See* APPEAL 96

———, s. 36.
See APPEAL IN CRIMINAL CASES ... 518

———, s. 119.
See EVIDENCE 455

———, s. 172.
See ABSCONDING OF ACCUSED ... 861

———, s 263—
Discretion of Court—Verdict of Jury—Principles guiding the Court's Discretion under s. 263 of the Criminal Procedure Code (Act X of 1872)—Intention and Inference of Fraud.] Notwithstanding the large discretionary powers vested in the High Court under s. 263 of Act X of 1872, the Court will adhere generally to the principle of the Courts in England, *viz.*, that the Court will not set aside the verdict of a jury unless it be perverse and patently wrong or may have been induced by the error of the Judge; and when the Court is asked to do so on the ground that the verdict is against the weight of evidence, the question is, not whether the learned Judge who tried the case was or was not dissatisfied with the verdict, or whether he would have come to the same conclusion as the jury, but whether the verdict was such as reasonable men ought to have come to. Where a person, in the course of an action brought against him to gain possession of a property, uses a forged document for the purpose of supporting his title, though there may be no necessity for the use of it, such a user is clearly fraudulent. A general intention to defraud, without the intention of causing wrongful gain to one person or wrongful loss to another, would, if proved, be sufficient to support a conviction: and such an intention is a necessary inference which the jury should be directed to draw, if they are satisfied that the accused has uttered a forged document as a true one, meaning it to be taken as such, and knowing it to be forged. Under s. 263 of the Code of Criminal Procedure, a Court is authorized to ask the jury such questions as are necessary to ascertain what their verdict really is, but where the verdict, although perhaps erroneous, is not ambiguous, it is the duty of the Judge to record it without further question. IN THE MATTER OF DHUNUM KAZEE 53

———, s. 453.
See JOINDER OF CHARGES ... 371

———, ss 504, 505.
See SECURITY FOR GOOD BEHAVIOUR. 215

———, s. 518—
Jurisdiction of Magistrate—Protection of property.] A Magistrate has no jurisdiction to make an order under s. 518 of the Code of Criminal Procedure merely for the protection of property. IN THE MATTER OF THE PETITION OF PRAYAG SINGH 103

———1882, s. 123.
See APPEAL IN CRIMINAL CASE ... 878

———, s. 133
—Nuisance—Erection of Buildings—Unconditional order] Every order made under s. 133 of the Code of Criminal Procedure, Act X of 1882, must appoint a time within which, and a place where, the person to whom it is directed may appear before the Magistrate, and move to have the order set aside or modified. No unconditional order can be made under that section. THE EMPRESS v. BROJOKANTO ROY CHOWDHRY 637

———, s. 309—
Trial by Assessors—Summing up of Evidence—Delivery of opinions of Assessors—Sessions Judge, Duties of.] The power of summing up the evidence given by s. 309 of the new Code

Criminal Procedure Code—*continued.*
of Criminal Procedure, Act X of 1882, is intended to be exercised in long or intricate cases, and the Sessions Judge should confine himself to summing up the evidence and should not obtrude on the assessors his opinion of the worthlessness or otherwise of certain portions of the evidence. The Sessions Judge should also conform strictly to the words of s. 309, and require *each* assessor to state his opinion orally. The Sessions Judge should not utilize the services of the pleader for the prosecution for the purpose of recording his summing up to the assessors. If he is not capable of recording the substance of it himself, he should employ an independent person for that purpose. SHADULLA HOWALDAR *v.* THE EMPRESS ... 875

Criminal Procedure Code, 1882, s. 408. *See* APPEAL IN CRIMINAL CASES ... 513

——————————, s. 439. *See* REVISION 513

Cross Appeal. *See* CIVIL PROCEDURE CODE 1882, s. 561 631

——— **Decrees.** *See* SET-OFF ... 479

Cultivation. *See* LANDLORD AND TENANT 609

Custom *See* LIMITATION ACT, 1877, s. 26, 698

Cuttack, Tenures in. *See* LANDLORD AND TENANTS 526

Damages, Measure of. *See* MORTGAGE 234

———**Right to sue for.** *See* SALE IN EXECUTION OF DECREE 695

———**Suit for.** *See* CIVIL PROCEDURE CODE 1877, s 43 143

———**for trespass, Suit for.** *See* SPECIAL APPEAL 116

Daughter succession of, before marriage *See* HINDU LAW, INHERITANCE ... 154

Daughter-in-law *See* HINDU LAW, INHERITANCE 315

Debt secured by Mortgage of Immoveable Property. *See* SALE IN EXECUTION OF DECREE 511

Debtor and Creditor. *See* HINDU LAW, CONTRACT 825

Debts. Direction in will for payment of. *See* SALE IN EXECUTION OF DECREE 406

———**due by ancestor. Decree against heirs for.** *See* SALE IN EXECUTION OF DECREE 406

Declaratory decree, Suit for. *See* HINDU LAW, REVERSIONER 817

——————————*See* JURISDICTION OF REVENUE COURT 925

Decree. Construction of. *See* EXECUTION OF DECREE 857

Decree—*continued.*

———**against father of joint family.** *See* HINDU LAW, ALIENATION ...452, 495

———**heirs for debt due by ancestor.** *See* SALE IN EXECUTION OF DECREE 406

———**Insolvent** *See* SALE IN EXECUTION OF DECREE. 217

———*Construction of Decree—Mortgage Decree directing accounts, &c., to be taken and Report given—Tender of Principal and Interest before Report—Refusal to accept Tender and subsequent charge of Interest.*] A decree directed accounts to be taken of what was due for principal and interest under a mortgage, such interest to be allowed "up to the time of payment hereinafter mentioned or until six months from the date of the decree," whichever first should happen; and further directed the plaintiff to pay what should be reported due for principal and interest up to the date of payment and costs, with interest at 6 per cent. from the date of taxation until payment, within six months after the Registrar should make his report. The plaintiff tendered a sum sufficient to cover the principal and interest due, but insufficient to cover costs, at a time prior to the drawing up of the Registrar's report. *Held*, that the payment of principal and interest "hereinafter mentioned" referred to a time after the Registrar had made his report, because the sum to be paid was a sum reported to be due by the Registrar, and that, therefore, a tender made before the Registrar's report was given was not a sufficient tender to stop interest from the date of the tender. ADMINISTRATOR-GENERAL OF BENGAL *v.* MIRZA AHMED BEGG ... 33

———**Sale of**—*Decree on Mortgage-bond—Registration—Right to execute decree.*] A decree-holder purported to sell to *A*, by private sale, all his right, title, and interest in a mortgage-decree obtained by him in a suit on a mortgage-bond against the mortgagor. The deed of sale was not registered. Afterwards, by a registered deed of sale, *A* conveyed all his right, title, and interest in the same decree to *B*. *Held*, that the right to execute the decree as a mortgage-decree did not pass to *B*. KOOB LALL CHOWDHRY *v.* NITTYA NUND SINGH 389

———, **Ex-parte, setting aside** *See* LIMITATION ACT, 1877, ART. 164 ... 869

———**Form of.** *See* JURISDICTION OF REVENUE COURT 383

———**payable by Instalments.** *See* EXECUTION OF DECREE ... 857

———, **Statement in** *See* EVIDENCE ACT, 1872, s. 35 586

Default in payment on due date. *See* INTEREST.. 689

Defence. Order for striking out. *See* PRACTICE 923

Delivery by instalments. *See* CONTRACT 473

Direction in will for payment of debts *See* SALE IN EXECUTION OF DECREE 406

Discretion of Court as to re-hearing. *See* REVIEW 209

——**of suit.** *See* APPEAL ... 627

Dismissal for non-appearance. *See* CIVIL PROCEDURE CODE, 1877. s. 103. 426
See RES-JUDICATA 426

——, **On failure to pay summons' costs.** *See* RES-JUDICATA ... 163

Dispossession. *See* LIMITATION ACT, 1877, s. 26 698

——*See* ONUS PROBANDI 125, 130

——*See* POSSESSION ... 744

Distribution of sale proceeds. *See* SALE IN EXECUTION OF DECREE ... 920

Documentary evidence. Objection as to admissibility of *See* EVIDENCE TAKEN ON COMMISSION 939

Donor. Possession retained by. *See* HINDU LAW, GIFT 854

Ejectment. *See* LANDLORD AND TENANT, 808

——*See* RIGHT OF OCCUPANCY... 648

——**Suit for.** *See* LIMITATION ACT, 1877, ART 120 147

——*See* RIGHT OF OCCUPANCY 330

Endowment *See* HINDU LAW, ENDOWMENT

Enhancement of rent. *See* LANDLORD AND TENANT 252

Enhancement of rent—*Land let for purpose of clearing at certain rent.*] When land is let for the purpose of clearing jungle, or other reclamation, and on this ground, or any other ground mentioned in the lease, a reduced rent is provided for the first few years, and it is said that the rent is to be at a certain rate as the full rent, such rent is not liable to enhancement. HURO PROSAD ROY CHOWDHRY *v.* CHUNDRE CHURN BOYRAGEE ... 505

Enhancement of rent, Notice of. *See* LANDLORD AND TENANT 72

——**Suit for.** *See* CIVIL PROCEDURE CODE 1882. ss. 42-43 ... 919

Enhancement of rent——*Co-sharers—Notice of enhancement—Parties.*] *A* and *B* were talukdars of a certain village, each having an eight annas share. A certain ryot held a jote within the village, in respect of which he paid his rent separately—eight annas to *A* and eight annas to *B*. *A* served a notice of enhancement on the ryot, but the notice was signed by *A* only, and it did not appear that the consent of *B* had been previously obtained. *A* afterwards instituted a suit for arrears of

Enhancement of Rent—*continued.*
rent at the enhanced rate, making *B* a defendant to the suit. *Held*, that the notice of enhancement was sufficient to maintain a suit so framed. BIDHU-BHUSUN BASU *v.* KOMARADDI MUNDUL 864

Entry in register. *See* EVIDENCE ACT s. 35 431

Error in title of petition of appeal. *See* PRACTICE 629

Estoppel—*Evidence Act, s 115—Sale in execution of decree—Intervenor in Rent Suit.*] A purchase by a mortgagee, at a sale in execution of a decree upon his mortgage of the right, title, and interest of the mortgagor, who has been estopped from asserting a title to the property as against certain parties, does not place such mortgagee in a better position as regards the estoppel. A suit for rent by a zemindar and patnidar against a darpatnidar, was defeated by the defence of the latter that he had conveyed his interest to others, against whom the former afterwards obtained a decree, and brought the darpatni to sale in execution, buying their right, title, and interest therein himself. From the darpatnidar, who had thus disclaimed title, a third party claimed to be mortgagee, and set up a decree on his mortgage followed by a purchase of the tenure at a sale in execution. He was thereupon allowed to intervene in a suit for rent brought by the zemindar and patnidar against an ijaradar of lands within the darpatni estate. *Held*, that, notwithstanding this purchase, the intervening mortgagee was bound by the estoppel arising out of the mortgagor's disclaimer of title in the suit above-mentioned. PORESNATH MUKERJI *v.* ANATHNATH DEB 265

Evidence—*Criminal Procedure Code (Act X of 1872), ss. 119, 323—Statements of witnesses to a Police Officer during an investigation—Refreshing memory—Medical witnesses, Evidence of—Opinion of experts how elicited—Examining at Sessions trial medical witness who has been examined before the Magistrate—Post-mortem examination reports.*] In giving evidence a police officer may refresh his memory by referring to documents in which he has, under s 119 Act of X of 1872, reduced into writing statements of persons examined by him during an investigation, but the documents themselves cannot be used as evidence, and a Judge should not read such documents to a jury in order to point out discrepancies between the evidence and previous statements of the witnesses. The evidence of a medical man who has seen, and has made a *post-mortem* examination of the corpse of the person touching whose death the inquiry is, is admissible, firstly, to prove the nature of injuries which he observed; and, secondly, as evidence of the opinion of an expert as to the manner in which those injuries were inflicted, and as to the cause of death. A medical man who has not seen the corpse is

Evidence—*continued.*
only in a position to give evidence of his opinion as an expert. The proper mode of eliciting such evidence is to put to the witness hypothetically the facts which the evidence of the other witnesses attempts to prove, and to ask the witness's opinion on those facts. Section 323 of Act X of 1872 does not in any way preclude the Judge at a Sessions trial from calling and examining the medical witness who has been examined before the Magistrate, and in every case in which the deposition taken by the Magistrate is essentially deficient or requires further elucidation, such witness should be called and examined by the Sessions Judge. A medical man in giving evidence may refresh his memory by referring to a report which he has made of his *post-mortem* examination, but the report itself cannot be treated as evidence and no facts can be taken therefrom. ROGHUNI SINGH *v.* THE EMPRESS 455

———*Local Investigation—Judgment on facts observed by Judge but not proved.*] In a suit respecting boundaries, the Munsiff, before settling the issues in the case, visited the locality, and in his judgment relied upon certain facts which had come under his observation during his visit. These facts were not proved by any evidence, and the Munsiff did not make any report as to them. The District Judge reversed the Munsiff's decision on the oral evidence given in the case, holding that he could not take notice of the facts observed by the Munsiff himself, and on which he had based his judgment. *Held*, that though the result of the inquiry instituted by the Munsiff was not evidence according to the definition in the Evidence Act, it was a matter before the Court which might have been taken into consideration. *Held*, also, that the Munsiff should have put the result of his investigation upon paper. JOY COOMAR *v.* BUNDHOO LALL 363

———*Registration of tenure—Common Registry—Act XI of* 1859, *s.* 39.] The fact that a tenure is registered in the Common Registry under Act XI of 1859, s. 39, is not of itself *primâ facie* evidence that such a tenure exists. LUKHYNARAIN CHATTOPADHYA *v.* GORACHAND GOSSAMY 116

———**Admissibility of.** *See* REGISTRATION ACT 1877. *s.* 17 68

———*See* REGISTRATION ACT, 1877, *s* 49. 520

———*See* STAMP ACT, 1879 127

———**contradicting Document.** *See* EVIDENCE ACT, *s.* 92 .. 898

———**, Failure to produce, at hearing** *See* APPEAL 260

———**of possession.** *See* ONUS PROBANDI 39

Evidence taken on Commission—*Commission—Documentary evidence, Objection to admissibility of—Evidence taken by Commissioner beyond jurisdiction—Notice to produce original document—Refusal to produce—Evidence Act (I of* 1872), *s.* 63 *sub-section*, 3, 65 66. If when evidence is taken before Commissioners, a document is tendered and objected to on any ground, the opposite party is not precluded from objecting to the document at the trial on any other ground. It is not necessary to state all the objections to the admissibility of a document when it is first tendered, but the party objecting is at liberty to take any fresh objection whenever the party producing the document tenders it in evidence.

Where a commission to take evidence is issued to any place beyond the jurisdiction of the Court issuing the commission, it is not necessary, in order to admit secondary evidence of the contents of a document, that the party tendering it should have given notice to produce the original, nor is it necessary for him to prove a refusal to produce the original. BALLI *v.* GAU KIM SWEE 939

———**Act** (I of 1872), s. 32, cl. 6—*Horoscope.*] In a suit to recover possession of immovable property, the plaintiff tendered in evidence a horoscope which he said had been given to him by his mother, and had been seen by members of his family and used on the occasion of his marriage. He was unable to say by whom the horoscope, or an endorsement on it, which purported to state what his name was, had been written. *Held*, that the horoscope was not admissible under s. 32, cl. 6, of the Evidence Act. RAMNARAIN KALLIA *v.* MONEE BIBEE AND RAMNARAIN KALLIA *v.* GOPAL DOSS SING... 613

———— *s.* 35—*Admission—Statement in Decree—Practice of Mofussil Courts.*] In a suit for possession of a fishery, the plaintiff sought to put in evidence an admission alleged to have been made in the year 1818 by the defendant's predecessor in title in a written statement in a former suit. The only evidence of the admission was that contained in the decree in the former suit, the ordinary part of which was prefaced with a short statement of the pleadings in the suit. Under the old practice of Mofussil Courts, it was the duty of the Court to enter in the decree an abstract of the pleadings in each case. *Held*, that the statement in the decree was evidence of the admission under s 35 of the Evidence Act (Act I of 1872). *Lekraj Kuar* v *Mahpal Singh*, I. L R., 5 Calc., 744, referred to PARBUTTY DASSI *v.* PURNO CHUNDER SINGH 586

———*Land Registration Act (Beng. Act VII of* 1876), *s* 55—*Entry in register, Effect of—Question of Possession.*] Entries made under Beng. Act VII of 1876 by the Collector recording the names of

Evidence Act—*continued.*
proprietors of revenue-paying estates are not evidence under s. 35 of the Evidence Act of the fact of proprietorship. That section relates to the class of cases where a public officer has to enter in a register or other book, some actual fact which is known to him, *e.g.*, the fact of a death or a marriage The entry by the Collector in the register under Beng Act VII of 1876 is not, properly speaking, the entry of a fact. It is a statement that the person is entitled to the property; it is the record of a right, not of a fact. *Per* GARTH, C J.—*Semble* that s. 55 of Beng. Act VII of 1876 constitutes the Collector a competent Court under particular circumstances for determining as between two disputants the question of possession, and his recorded decision upon that question in the register might be evidence of the fact of possession as between those two parties *Ram Bushan Mahto* v *Jibli Mahto*, I. L R, 6 Calc, 853, explained. SARASWATI DASI v. DHANPAT SINGH 431

——————, s. 63, cl. 3, and ss 65 and 66. *See* EVIDENCE TAKEN ON COMMISSION 939

——————, s. 83—*Measurement Chittas.*] Chittas made by Government for its own private use are nothing more than documents prepared for the information of the Collector, and are not evidence against private persons for the purpose of proving that the lands described therein are or are not of a particular character or tenure. RAM CHUNDEE SAO v. BUNSEEDHUR NAIK 741

——————, s. 92. *See* GOVERNMENT SECURITIES, CONTRACT FOR SALE OF 791

——————*Mortgage—Sale—Conduct of Parties—Oral Evidence when admissible to prove that an apparent sale is a mortgage—Admissibility of Parol Evidence to vary a written Contract.*] The defendant, in answer to a suit by the plaintiff for possession of certain land, alleged that the kobala which purported to be an out-and-out sale in favor of the plaintiff, and on which the plaintiff based his title to the property, was intended by the parties to operate only as a mortgage; and to prove such allegations tendered evidence of the circumstances under which the kobala was executed, and of the conduct of the parties to show that the document had all along been treated as a mortgage and intended to operate as such. *Held*, that such evidence was admissible. *Held*, also, that s. 92 of the Indian Evidence Act made no alteration in the law as laid down in *Kashi Nath Chatterjee* v. *Chandi Charan Banerjee*, B L. R Sup. Vol., 383; S. C 5 W. R, 62, but is in accordance with what was decided in that case. *Bakru Lukshman* v. *Govinda Kanji*, I. L. R, 4 Bom., 594, followed; *Ram Doyal Bajpie* v. *Hera Lal Paray*, 8 C. L. R., 386; and *Dusmodder Paik* v. *Kalm Faridar*, I. L. R., 5 Calc, 300; S. C., 4 C. L. R., 419, dissented from. HEM CHUNDER SOOR v. KALLY CHURN DAS 528

——————*Evidence contradicting Document—Mortgage—Conditional Sale*] It does not necessarily follow from s. 92 of the Evidence Act that subsequent conduct and surrounding circumstances may not be given in evidence for the purpose of showing that what on the face of it is a conveyance is really a mortgage. This rule turns on the fraud which is involved in the conduct of the person who is really a mortgagee, and who sets himself up as an absolute purchaser, and the rule of admitting evidence for the purpose of defeating this fraud would not apply to an innocent purchaser without notice of the existence of the mortgage, who merely bought from a person who was in possession of title deeds and was the ostensible owner of the property. KASHI NATH DASS v. HURRIHUR MOOKERJEE 898

——————, s. 115. *See* ESTOPPEL ... 265

Execution of Decree. *See* LIMITATION... 711

——————*See* LIMITATION ACT, 1871, Art. 167... 446

——————*See* MESNE PROFITS 112

——————*See* MORTGAGE ... 406

——————*See* RIGHT OF SUIT 10

——————*Decree payable by instalments—Instalments—Construction of Decree—Limitation.*] A consent decree for Rs. 350 directed payment of the money by fourteen half-yearly instalments of Rs. 25 each, in Cheyt and Assin of each year, the first instalment to be paid in the month of Cheyt 1283 (March-April 1877). The decree contained a provision that in default of payment of any one instalment, the execution-creditor should have the option of executing the decree for the whole amount remaining unpaid. Default was made in payment of the first instalment, but the judgment-debtor paid up (not on due date) the instalment which fell due up to, and including Assin 1285 (October November 1878), when he stopped making any payments. On the 26th of November 1881 the decree-holder applied for execution in respect of all sums then remaining unpaid under the decree. The District Judge allowed execution to issue for all sums which had fallen due within three years previously to the date of the application for execution, but refused to allow execution to issue in respect of the instalments not then due. *Held*, that the execution-creditor must be considered to have waived his right to execute the decree for the whole amount, but was entitled under the decree to realize any instalments which were still due. NILMADHUR CHUCKERBUTTY v. RAMSODOY GHOSE ... 857

——————*Execution on the application of one of several joint Decree-holders.*] The effect of a Privy Council judgment being that each of two co-plaintiffs was entitled to a

Execution of Decree -*continued.*
moiety of a taluk in the possession of the defendant, who then purchased the interest of one of them. *Held*, that the other co-plaintiff could obtain execution according to the extent of her interest in the estate HURRISH CHUNDER CHOWDHRY *v* KALISUNDERI DEBI 48

——————— *Joint Decree—Payment out of Court to one of several joint judgment-creditors—Part satisfaction certified to the Court—Application for execution of full amount of decree—Civil Procedure Code (Act XIV of 1882) ss. 231, 244, 258*] On an application for execution for the full amount due under a decree by some of several joint decree-holders, the judgment-debtor objected to execution being granted for the full amount of the decree on the ground that he had already paid off a large portion of the money due under the decree to *B*, one of the joint decree-holders. The payment was made out of Court, but *B*, who claimed to be entitled to a 12½ annas share in the decree, certified the payment in the manner prescribed by s. 258 of the Civil Procedure Code (Act XIV of 1882), and represented that his claim had been satisfied in full The other joint decree-holders denied *B's* right to the 12½ annas share claimed by him, and refused to recognise the payment said to have been made to him. The lower Court disallowed the objection, and granted execution for the full amount of the decree. *Held* that, regard being had to the provisions of the General Clauses Act (Act I of 1868) the word "decree-holder" in s. 258 of Act XIV of 1882 should be read in the plural, and looking at the provisions of s. 231 of the later Act, the Court ought not to recognise payments made out of Court, unless made and certified for the benefit of all the joint decree-holders of any portion of the decree in excess of that to which the decree-holder so paid is undisputedly entitled. *Held*, also, that a judgment-debtor is entitled to credit for any sum paid *bonâ fide* to one of several joint decree-holders, and duly certified to the Court by the latter, and that the other joint decree-holders cannot execute the decree for more than their own share *Held*, further, that in this case the lower Court was wrong in wholly ignoring the payment certified by the decree-holder *B*, and that it should have determined, *first*, whether the payment to *B* was a fraud on the other joint decree-holders, and, *secondly*, what amount the latter were entitled to have out of the whole decree, the latter being the main question between the applicants for execution and the judgment-debtor, and as such clearly within the scope of s. 244 of the Civil Procedure Code. *Ranee Nyna Kooer* v. *Doolee Chund*, 22 W. R., 77; *Brojesswari Chowdhranee* v. *Tripoora Soonderee Debi*, 3 I. L. R., 513; and *Mahima Chandra Roy* v. *Pyari Mohan Chowdhry*, 2 B. L. R., Ap., 43. TIARRUCK CHUNDER BHUTTACHARJEE *v* DAVENDRO NATH SANYAL 813

Execution of decree. Application for.
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——————— **Order in**
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See SUPERINTENDENCE OF HIGH COURT 295

——————— **order of Privy Council**
See CIVIL PROCEDURE CODE, 1877, s. 610 482

Experts *See* EVIDENCE 455

Extinction of Charge. *See* MORTGAGE 961

Fact, Findings of *See* SECOND APPEAL .. 309

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Failure to produce Evidence at hearing.
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Final disposal of suit *See* COSTS ... 797

Fishery, Right of *See* LIMITATION ACT, 1877, s. 26 698

Foreclosure, Notice of *See* MORTGAGE 643

Forfeiture. *See* LANDLORD AND TENANT 526, ... 609, 808 843

——————— **Relief against** *See* BENGAL ACT, VIII of 1869, s 52 88

Forgery and Abetment of Forgery.
See FRAUD 53

Frame of Suit. *See* PARTIES . 651

Fraud—*Forgery and Abetment—Using forged document—Penal Code, s 471—Intention to defraud—Inference of Fraud*] Where a person, in the course of an action brought against him to gain possession of a property, uses a forged document for the purpose of supporting his title, though there may be no necessity for the use of it, such a user is clearly fraudulent. A general intention to defraud, without the intention of causing wrongful gain to one person or wrongful loss to another, would, if proved, be sufficient to support a conviction: and such an intention is a necessary inference which the jury should be directed to draw, if they are satisfied that the accused has uttered a forged document as a true one, meaning it to be taken as such, and knowing it to be forged. IN THE MATTER OF DHUNUM KAZEE 53

General Clauses Consolidation Act, 1868,
s. 2, cl 5. *See* JURISDICTION 535

——————— s. 6
See LIMITATION ACT, 1871, ART. 167 ... 446

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Ghatwali Tenure. *See* JAGHIR ... 187

——— *See* SALE IN EXECUTION OF DECREE 388

Gift. *See* HINDU LAW, GIFT ... 830 854

——— **Ineffectual** *See* HINDU LAW, WILL 952

——— **over of accrued share.** *See* HINDU LAW WILL ... ... 95_2

——— **Requisites of.** *See* MAHOMEDAN LAW GIFT 138

Gomasta. *See* BENGAL ACT VIII OF 1869, s. 32 450

Good Behaviour, Security for. *See* APPEAL IN CRIMINAL CASE ... 878

Government, Effect of partition as against. *See* PARTITION 419

Government, Land acquired by for public purposes. *See* KABULIAT, CONSTRUCTION OF 571

——— **Revenue.** *See* CONTRIBUTION, SUIT FOR 377

——— **Securities, Contract for sale of**—*Time bargain—Contract Act IX of* 1872, *ss.* 23 *and* 30—*Evidence Act* (*I of* 1872), *s.* 92—*Tender—Readiness and willingness.*] The question whether an unambiguous written contract for the sale and purchase of Government paper is a contract or agreement by way of wager, must be decided on the expressed terms of the contract itself, and parol evidence is not admissible to vary or contradict those terms. Where a contract for the sale and purchase of Government paper provides for the delivery of the paper on a subsequent date, it is not necessary, in order to sustain an action against the buyer for non-acceptance on the due date, that the plaintiff should have taken the Government paper contracted for to the place of business of the defendant and then and there made an *actual* tender of it. JUGGERNATH SEW HUX *v.* RAM DYAL 791

Grandfather's Estate. *See* HINDU LAW, INHERITANCE 70

Ground for Transfer. *See* TRANSFER OF CASE 980

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Guardian. *See* MAHOMEDAN LAW, GUARDIAN 599

——— **Application for Execution by** *See* LIMITATION ACT, 1877, s. 7 .. 181

——— *Minor Plaintiff—Guardian ad litem—Act XL of* 1858, *s.* 3.] A Mahomedan created a *wuqf* of all his property, and appointed his minor grandson mutwalli, providing that, during the minority, the property should be managed by the minor's father. In execution of a decree against the minor's father, the endowed property was attached and sold. In a

Guardian—*continued.*

suit by the minor through his sister, as guardian, to recover possession of the property, in which suit the sister was not made guardian *ad litem* by an order of Court, but was allowed to sue by the District Judge, *Held*, that the suit was maintainable as framed. LUTCHMIPUT SINGH *v.* AMIR ALUM 176

Hathchitta *See* STAMP ACT, 1879 ... 127

High Court, Jurisdiction of. *See* REVISION 513

High Court's Criminal Procedure Act (X OF 1875), ss 14 AND 147—*Commitment, Application to quash—24 and 25 Vict., c.* 104. *ss.* 13 *and* 15] The words "or other proceeding" in s. 147 of Act X of 1875 do not include a commitment, and an application to have a commitment quashed can be entertained under the provisions of this section. Applications under s. 14 of that Act must be disposed of by the High Court in the exercise of its Ordinary Original Criminal Jurisdiction. CHAROO CHUNDER MULLICK *v.* THE EMPRESS 397

Hindu Law, Adoption—*Simultaneous Adoption.*] A simultaneous adoption is not valid according to Hindu Law. The adoption of one son alone is actually and in itself wholly sufficient to satisfy the purpose of the law; the adoption of two is not within the scope of the power of adoption, and where such a thing is attempted, neither of the children is the legally adopted son of the deceased, although the ceremonies of adoption may have been performed as regards each and also at the same time. GYANENDRO CHUNDER LAHIRI *v.* KALLA PAHAR HAJEE 50

Hindu Law, Alienation. *See* CIVIL PROCEDURE CODE, 1882, s. 288 888

——— *Mitakshara—Joint family trade—Alienation of ancestral property by some of the members of the family—Interest of adult son affected by sale in execution of a decree against his father—Parties to suit*] A family, governed by Mitakshara law, carrying on trade in the names of some of its members, having become indebted to the defendants in a large amount in respect of advances made for the purposes of the trade, some of the head members of the family executed a bond in favour of the defendants for the amount due, and hypothecated certain family properties which stood in their names as collateral security therefor. The amount not having been paid on the due date, the defendants brought a suit on the bond against the persons who had executed it, and obtained a decree which, however, did not direct that the properties hypothecated should be sold. In execution of that decree the interest of the judgment-debtors in the hypothecated properties, and in other family properties, were sold and were purchased by the defendants, who, subsequently, under their

Hindu Law, Alienation—*continued.*
purchase, obtained possession of the shares of the judgment-debtors and those of their sons. The decree not having been satisfied by those sales, the defendants brought a suit against the remaining head members of the family to have it declared that their interests in the family properties were liable to satisfy the decree, and that suit also was decreed. Under the last decree the interests in the family properties of the judgment-debtors under that decree were sold, and were purchased by the defendants who subsequently obtained possession of the shares of those judgment-debtors and of the shares of their sons. Some of the sons of the judgment-debtors in both decrees were adult at the time when the suits were instituted In suits brought many years after the sales, by members of the family who had been parties to the previous suits, to recover their shares in the family properties, *held*, that the interests of all the members of the family had passed on the sales. *Per* MITTER, J.—There is no distinction in principle between the case of an adult son and that of a minor son as regards a son's interest in ancestral property being liable to pass on a sale of such property in execution of a decree against his father only; but if an adult son proves that he would have been able to save the property by paying off the debt out of his private funds, if he had been a party to the suit, *quære*, whether he should not be allowed to have the sale set aside on payment of the debt due under the decree A son's interest may pass on a sale of ancestral property in execution of a money decree against his father, but whether it does or does not pass will have to be determined by the circumstance of each case. Delay in bringing proceedings to impeach sales is a matter for consideration in determining what interests pass on the sale. BASO KOOER *v.* HURRY DASS 496

——————*Joint family property—Mitakshara—Decree against the father of a joint family for lawful debts—Sale of the whole joint estate in execution of decree against one co-sharer*] *A*, a judgment-creditor, having obtained a decree against *B*, the father of a joint Hindu family governed by the Mitakshara law, in a suit to which the sons of *B* were not parties, but in which it was proved that the debt had been incurred for lawful purposes, proceeded to execute his decree by attaching and selling the joint family property. Thereupon the sons came in and objected to their interest in the property being sold in execution of a decree in a suit to which they were not parties, and, on their objection being disallowed, filed a suit against *A* and *B* to have it declared that their interest in the property was not liable to be sold to satisfy the decree. *Held*, that the debt in respect of which the decree had been passed having been contracted for lawful purposes, the judgment-creditor was entitled to execute his decree against the whole of the joint family property. *Held*, also, that the ruling in the case of *Deendayal Lal* v *Jugdeep Narain Singh*, I L. R., 3 Calc., 198, had no application to the facts in this case. RAMDUT SINGH *v.* MAHENDER PRASAD ... 452

——————*by father—Mitakshara—Joint family—Sale in execution of money decree against father of Mitakshara family.*] The mere fact of a decree being passed against the father only of a joint family governed by the Mitakshara law will not lead necessarily to the conclusion that what was sold in execution of that decree is only the father's interest in the joint family property. Notwithstanding the decree being against the father only under certain circumstances, there may be a valid sale of a joint property belonging to the family in execution thereof. In execution of two money decrees against *A* alone, the right, title and interest of *A* in certain joint family property was sold, and the entire share of the joint family was taken possession of by the auction-purchasers. In a suit by the minor son and wife of *A*, who with *A* constituted a joint family governed by the Mitakshara law to recover possession of their shares in the property sold, *Held* that, although the plaintiffs were not parties to the decrees, in execution of which the sales took place, the mere fact of *A* being sued alone was not sufficient to justify the finding that only his right, title and interest passed under the sales, and that as the facts of the case showed that the decrees were passed with reference to transactions which clearly concerned the joint family, the whole of the share of the joint family in the properties sold passed to the auction-purchaser, the plaintiffs having failed to show that the debts, which were the foundation of the decrees in execution of which the sales were held, were contracted for immoral purposes *Umbica Prosad Tiwary* v. *Ram Sahay Lall*, I. L. R, 8 Calc., 898; and *Ponnappa Pillai* v. *Pappuayyangar*, I. L. R, 4 Mad, 1 followed; *Ramphal Singh* v. *Deg Narain Singh*, I. L. R., 8 Calc., 517, dissented from. SHEO PROSHAD *v.* JUNG BAHADOOR ... 389

——————, **Contract**—*Debtor and Creditor—Damdupat—Interest in excess of Principal.*] Since the passing of Act XXVIII of 1855, a Hindu creditor may claim for his Hindu debtor interest in excess of the principal sum lent, should such interest have accrued. The rule of law prohibiting the recovery of interest in excess of the principal sum lent was in force in the Mofussil of Bengal not as a provision of Hindu law, but as a statutory rule introduced by Regulation XV of 1793, and embracing all persons contracting in the mofussil. SURJYA NARAIN SINGH *v.* SIRDHARY LALL 825

——————*Interest exceeding principal—Suits between Hindus in Mofussil—Act XXVIII of 1855, s. 2.*] In suits between

Hindu Law, Contract *-continued.*
Hindus in the Motasal interest exceeding the principal may be awarded. HET NARAIN SINGH *v* RAM DEIN SINGH ... 871

——— **Endowment**—*Succession to the management of a religious endowment, as sebait —Usage of the institution.*] On a claim to succeed to the management, as sebait, of a religious institution endowed with property, it was contended that in the absence of prescribed rule, or of established usage, succession took place according to the ordinary rules of the Hindu law of inheritance, where the sebait led a family life. *Held* that, where owing to the absence of documentary or other direct evidence, it does not appear what rule of succession has been laid down by the endower, it must be proved by evidence what is the usage In the present instance the usage did not support the claim; and, upon the evidence, the claimant, who was out of possession, failed to make a title. JANOKI DEBI *v.* GOPAL ACHARJIA GOSWAMI 766

——— ———, **Gift**—*Husband and Wife—Immovable Property.*] It is not necessary in Hindu law, in order that a wife should take an absolute estate in immovable property under a deed of gift from her husband, that the gift should be made with such words of limitation as are ordinarily used to convey an estate of inheritance. The intention of the husband may be expressed in other ways, and is a matter of construction merely. *Koonj Behary Dhur* v. *Prem Chand Dutt*, I. L. R., 5 Calc., 684; 5 C. L R., 561, distinguished. RAM NARAIN SINGH *v.* PEARY BHUGUT 880

——— ——— *Possession retained by Donor—Transfer of Possession—Symbolical transfer.*] A gift by a Hindu unaccompanied either by possession on the part of the donee or any symbolical act, such as handing over documents of title, or permitting the donee to receive rents, is not in itself a valid transaction, even though the deed of gift be registered. DAGAI DABEE *v.* MOTHURA NATH CHATTOPADHYA 854

——— **Inheritance**—*Bengal School of Hindu Law—Sapinda—Brother's daughter's son.*] According to the Bengal School of Hindu law a brother's daughter's son is a *sapinda*, and is, therefore, a preferable heir to the great-great-great-grandfather's great-great-great-grand-son DIGUMBER ROY CHOWDHRY *v.* MOTI LAL BUNDOPADYA 563

——— ———*—Descent of lands purchased by widow out of income of life-estate.*] Land purchased by a Hindu widow with money derived from the income of her life-estate passes, when undisposed of by her, to the heirs of her husband as an increment to the estate, and not to her heirs as property over which she had absolute control. ANUND CHUNDRA MUNDUL *v.* NILMONY JOURDAR. 758

Hindu Law, Inheritance *Mitakshara—Daughter-in-law.*] Under the Mitakshara and usages obtaining in the district of Behar a daughter-in-law, whose husband has predeceased his father, is not in the line of heirs of her father-in-law. *Per* MITTER, J —A daughter-in-law, not being a joint owner with her father-in-law, cannot after his death take his estate by right of survivorship. ANANDA BIBEE *v.* NOWNIT LAL 315

——— ——— *Mitakshara—Sister—Male Gotraja Sapindas—Stridhan.*] According to the Mitakshara law a sister is not in the line of heirs, and is not entitled to succeed in preference to male gotraja sapindas. Nor does an estate inherited by a female become her stridhan. Such estate on her death goes to the heirs of the last male heir, and not to the heir of her separate property. JULLESSUR KOORU *v.* UGGUR ROY 725

——— ——— *Succession by Daughter before her Marriage—Subsequent Marriage and Birth of Son—Death of such Daughter—Succession of Married Sister.*] On the death of a daughter, who had succeeded before her marriage to her father's estate, to the exclusion of her married sister, the estate so inherited by her devolves upon her married sister, who has, or is likely to have, male issue and not upon her own son. TINUMONI DASI *v.* NIBARUN CHUNDER GUPTA 154

——— ——— *Succession of Adopted son of one Daughter and Natural Son of another—Grand-father's Estate.*] The adopted son of one daughter shares equally with the natural son of another daughter in the inheritance left by his maternal grandfather. *Uma Sankar Moitro* v. *Kali Komul Mazumdar* followed. SURJOKANT NUNDI *v.* MOHESH CHUNDER DUTT 70

——— **Joint family**—*Joint property, Suit to recover—Onus probandi—Limitation Act*, 1877, *Arts* 127, 144.] The plaintiff sued for a share in certain property on the allegation that his ancestor *K* and the defendant's ancestor *R* were uterine brothers who, while they were living in commensality, purchased the property in question with their joint funds in the name of *R*; and that subsequently *K* left his home, and then his daughter, the plaintiff's mother, enjoyed the property jointly with *R* until her death, when the plaintiff succeeding to his right and interest applied to have his name registered as a joint proprietor, but his application was refused; hence this suit. The defence was that *R* bought the property in question with his own funds after he and his brother *K* had separated; that Radha Mohun, and afterwards the defendant, had been in exclusive possession for more than twelve years; and that the suit was barred by limitation. *Held* (reversing the judgment of FIELD, J.) that the onus was on the plaintiff to prove that the property was joint property Before a plaintiff can bring his case within Art

Hindu Law, Joint family—*continued.*
127 of schedule II. of the Limitation Act, 1877. It is incumbent on him to show that the property in which he seeks to recover a share is "joint property." OBHOY CHURN GHOSE v GOBIND CHUNDER DEY 237

——— *Separation of one member of family, Effect of.*] The separation of one member of a joint Hindu family does not necessarily create a separation between the other members, nor cause the general disruption of the family. *Radha Churn Dass* v. *Arupa Hindhu Dass*, I L R, 5 Calc, 475, dissented from. UPENDRA NARAIN MYTI v GOPEE NATH BERA 817

——— **Partition**—*Bengal School of Hindu Law—Widow's Estate—Jointt Widows—Alienation—Purchaser from Hindu Widow.*] Where a Hindu governed by the Bengal School of Hindu Law dies intestate leaving two widows his only heirs him surviving, either of those widows may sell her deceased husband's property, and the purchaser thereof is entitled to enforce a partition as against the other widow The partition, if decreed, should be effected in such a way as would not be detrimental to the future interests of the reversioners. JANOKI NATH MUKHOPADHYA v MOTHURANATH MUKHOPADHYA ... 580

——— **Reversioner**—*Declaratory Decree, Suit for—Waste by Hindu Widow—Suit to set aside compromise by Hindu Widow.*] Where the next reversioner after a Hindu widow sues, during the lifetime of the widow, for a declaration that a compromise made by her is not binding on him, it is no sufficient ground for refusing the declaration that the plaintiff may not succeed for many years to the possession of the property, or that some of the property is of a perishable nature. UPENDRA NARAIN MYTI v. GOPEE NATH BERA... 817

——— **Will, Construction of**—*Gift ineffectual so far as it departs from the law of inheritance—Gift over of accrued share.*] A gift by will, attempting to exclude the legal course of inheritance, is only effectual, in favor of such person as can take, to the extent to which the will is consistent with the Hindu law. And it is a distinct departure from that law to restrict the order of succession to males excluding females.

A testator gave by his will to three sons of his brother certain estates "for payment of the expenses of their pious acts." He also directed as follows: "The said three nephews shall hold possession of the above in equal shares, and shall pay the Government revenue of the same into the Collectorate. They shall have no right to alienate the same by gift or sale, but they, their sons, grandsons, and their descendants in the male line shall enjoy the same, and shall perform acts of piety as they respectively shall think fit for the spiritual welfare of our ancestors. If any die without leaving a male child, which God forbid, then his share shall devolve on the surviving nephews, and their male descendants, and not on their other heirs"

In a suit between the survivor of the three nephews and the testator's heir, *held*, that the attempt to alter the legal course of inheritance failed, and that the estate taken under the above clause was only for life.

The gift over of a life estate was competent; it being to persons alive, and capable of taking on the death of the testator, and to take effect on the death of a person or persons then alive.

On the death of one brother his share went to the two other brothers, and on the death of one of the latter his augmented share made up of his original and accrued share, went to the survivor. TAROKESSUR ROY v. SOSHI SHIBHUNESSUR ROY, SHOSHI SHIBHUNESSUR ROY v. TAROKESSUR ROY 952

——— **Widow**. *See* PARTITION ... 244

——— *Widow's Estate—Conveyance by presumptive heir—Ratification by widow—Effect of witnessing deed as rights of witness—Reversioners—Evidence of consent.*] During the lifetime of a Hindu widow, her son, the then presumptive heir to the property of which she was in possession, conveyed it to purchasers by deeds to which she was not a party. Subsequently she by separate deed ratified the conveyances This deed was witnessed by a more remote reversioner. The son died during the lifetime of his mother, and the witness to the deed of ratification became the next reversionary heir *Held*, in a suit by him after the widow's death for possession, that at the time of the conveyances the son had a mere contingent reversionary interest in expectancy, and that the subsequent ratification by his mother could not operate as a surrender of her estate so as to change the conveyances, and make them inure as absolute conveyances, but could only amount to a conveyance of her interest. *Held*, also, that the fact that the reversionary heir witnessed the deed of ratification, did not in itself amount to evidence of consent to it on his part. RAM CHUNDER PODDAR v. HARI DAS SEN ... 463

——— **Alienation by**. *See* LIMITATION ACT, 1877, ART. 141 ... 93

——— **Purchaser from**. *See* HINDU LAW, PARTITION 580

——— **Waste by**. *See* HINDU LAW, REVERSIONER 867

Horoscope *See* EVIDENCE ACT, 1872, s. 32 613

Husband and Wife. *See* HINDU LAW, GIFT 830

Immovable Property. *See* HINDU LAW, GIFT 830

——— **Charge on**. *See* JURISDICTION 535

——— **Debt secured by mortgage of**. *See* SALE IN EXECUTION OF DECREE 511

Immovable Property. Suit to obtain relief respecting. *See* SERVICE OF SUMMONS 753

Imported Liquor Possession of. *See* BENGAL EXCISE ACT, 1878, s. 61 ... 223

Incumbrance. *See* SALE FOR ARREARS OF RENT 683

Indemnity, Bond of. *See* PRINCIPAL AND SURETY 355

Indian Ports' Act, s. 22. *See* MASTER AND SERVANT 849

Inheritance. *See* HINDU LAW, INHERITANCE

——, **Gift inconsistent with Law of.** *See* HINDU LAW, WILL .. 552

Injunction. *See* LANDLORD AND TENANT 609

—— *See* RIGHT OF SUIT ... 75

Insolvency—*Landlord and Tenant—Sale for arrears of rent—Official Assignee—Beng. Act VIII of* 1869, *ss.* 59 *and* 60—*Insolvent Act, 11 and 12 Vict., c.* 21] A decree for arrears of rent of an undertenure was obtained against a tenant who became an insolvent, and whose tenure became vested in the Official Assignee by virtue of the provisions of the Indian Insolvent Act, 11 and 12 Vict., c. 21. An application was made under ss. 59 and 60 of the Rent Law, Beng. Act VIII of 1869, for an order that the tenure should be sold for its own arrears. The Official Assignee objected to the sale, and contended that the decree-holder's only right was to prove in the insolvency for the amount of his debt. *Held* that, whether the arrears of rent became due before or after the insolvency of the judgment-debtor, the decree-holder was entitled to sell the tenure in execution of his decree. CHUNDER NARAIN SINGH *v.* KISHEN CHAND GOLECHA ... 855

Insolvent, Decree against. *See* SALE IN EXECUTION OF DECREE 217

—— **Act.** 11 and 12 Vict., c. 21. *See* INSOLVENCY 855

Instalments. Decree payable by. *See* EXECUTION OF DECREE 857

Intention of Parties. *See* MORTGAGE... 961

—— **to defraud.** *See* FRAUD ... 53

Interest. *See* PRINCIPAL AND SURETY... 355

—— *See* SECOND APPEAL ... 309

—— *Penalty—Increased interest on default of payment—Contract Act IX of* 1872, *s.* 74.] A mortgage-bond contained a proviso that in case of default in payment of the principal sum, with interest at the rate of 1 per cent. per mensem on a certain day, interest should be paid at the rate of 2 per cent. per mensem from the date of the bond. *Held*, that the stipulation to pay increased interest must be constructed as a penal clause. MUTHURA PERSAD SINGH *v.* LUGGUN KOOER 615

Interest *—Promissory Note—Default in payment on due date—Enhanced rate of Interest—Penalty—Breach of Contract—Contract Act, s.* 74.] Where money is borrowed under a contract for repayment with interest on a certain day, and the contract stipulates that if the money is not paid at the due date it shall *thenceforth* carry interest at an enhanced rate, such a stipulation is not a penalty, and the enhanced rate agreed to be paid may be recovered in its entirety. *Mackintosh v Hunt*, I. L. R., 2 Calc., 202, followed; *Dansidhar v. Bu Ali Khan*, I. L. R., 3 All., 260, considered. MACKINTOSH *v.* CROW AND MACKINTOSH *v* GORE 689

—— **in Excess of Principal.** *See* HINDU LAW, CONTRACT .. 825, 871

—— **in Land** *See* ROAD CESS ACT, 1871 183

Intervenor in Rent Suit. *See* ESTOPPEL 265

Irregularity in Sale. *See* SALE FOR ARREARS OF RENT 172

—— *See* SALE FOR ARREARS OF REVENUE 591

—— *See* SALE IN EXECUTION OF DECREE 98, 656

Jaghir—*Inclusion of Jaghir Lands in area of Settled Zemindari—Ghatwali Tenure—Reg. XXIX of* 1874—*Liability to Attachment and Sale.*] In the area of a zemindari were included at the Permanent Settlement the mauzas which made up the mehal of a jaghir, the succession to which was subject to the sanction of Government, the jaghirdar being bound to render public services. One-third of the revenue assessed upon the jaghir mehal was retained by the jaghirdar, forming no part of the zemindari assets on which the jama of the latter was fixed. *Held*, that whether this jaghir was a ghatwali tenure or not within the meaning of the term as applied in Reg. XXIX of 1814 (the zemindari being Pachit, adjoining, and at one time included in, Birbhum) the jaghir was analogous to such tenure as described in the preamble to the Regulation *Held* also, that the nature of the tenure had not been altered by the Permanent Settlement, after which the services due by the jaghirdar remained, as before, public services, and continued to be due to the Government. That the zemindar became entitled only to the rent, or revenue, which was previously due to the Government, and in respect of which he was assessed, and did not become entitled to the services in respect whereof the one-third of the rent or revenue was allowed as compensation to the jaghirdar. That the jaghir, though hereditary, was not subject to the ordinary rules of inheritance according to the Hindu or the Mahomedan law, but was held upon the condition of approval of the heir by the Government. Thus were precluded both division of jaghir mehal upon the

Jaghir—*continued.*
death of the holder, and alienation during his life. It followed that the jaghir mehal was not liable to attachment and sale in execution of a decree against the father and predecessor in estate of a jaghirdar, so approved, as assets by descent in the possession of the latter. *Raja Inlanund Singh v. The Government of Bengal* (6 Moore's I. A., 101), NILMONI SINGH DEO v BAKRANATH SINGH AND THE SECRETARY OF STATE FOR INDIA IN COUNCIL ... 187

Jalkar. *See* ROAD CESS ACT, 1871 ... 183

Joinder of Charges—*Offences of the same kind committed in respect of different persons—Criminal Procedure Code (Act X of 1872) ss.* 452, 453, *and* 455.] Where an accused was charged under one charge including four counts, *viz.*,—(1) house breaking by night with intent to commit theft in the house of *A*; (2), theft from the same house; (3) house breaking by night with a like intent in the house of *B*; (4) theft from that house; and where he pleaded guilty to the first and third charges. *Held*, that the case was within the terms of s. 453, and that the words "offences of the same kind" are not to be limited by the explanation to that section, but include a case like this, where a man has within a year committed two offences of house breaking, *Held* also, that the word "offences of the same kind" are not limited to offences against the same person. *Per* FIELD, J.—The explanation to s. 453 must be understood as extending and not as limiting the meaning of that section. *Per* NORRIS, J.—Care should be taken that accused persons are not prejudiced by charges being joined, and the Court should at all times be anxious to lend a willing ear to any application upon their behalf for separation of charges, and for separate trials upon separate charges. *Empress* v. *Ataurri* (I. L. R. 4 All., 147) dissented from. MANU MIYA *v.* THE EMPRESS ... 271

Joint decree. Money paid in satisfaction of *See* SMALL CAUSE COURT, JURISDICTION OF 395

——— *See* EXECUTION OF DECREE 831

——— *See* LIMITATION ACT, 1877, ART. 179 568

——— **holders** *See* EXECUTION OF DECREE 482

Joint family. *See* HINDU LAW, ALIENATION 389

——— *See* HINDU LAW, JOINT FAMILY

——— **Liability of shares of members.** *See* COSTS 508

——— **Property.** *See* HINDU LAW, ALIENATION 452

——— **Suit to recover** *See* HINDU LAW, JOINT FAMILY ... 237

——— **trade** *See* HINDU LAW, ALIENATION 495

Joint owners. Adverse possession between *See* POSSESSION... .. 744

——— **property. Suit to recover** *See* HINDU LAW, JOINT FAMILY 237

——— **widows** *See* HINDU LAW, PARTITION 580

Judgment. *See* LETTERS, PATENT 1865, c). 15 482

Judicial officers. Protection of. *See* LIABILITY OF PUBLIC SERVANT .. 341

Jurisdiction *See* Act XX OF 1863, s. 14 123

——— *See* CAUSE OF ACTION ... 105

Jurisdiction—*Appeal—Revision—Offence committed out of British India.*] The High Court has no power, either by way of appeal or revision, to interfere with a sentence passed by the Superintendent of the Tributary Mehals when exercising jurisdiction over offences committed in Mohurbunj, a place not situated within the limits of British India. *Empress* v. *Keshub Mahajun*, I. L. R, 8 Calc, 985.; and *Hurree Mohapatro v. Dinabundhu Patro* I. L. R., 7 Calc., 523, referred to. THE EMPRESS v. HURRO KOLE 288

——— *Rajah of Tipperah—Sovereign Prince—Suit against Sovereign Prince with respect to land owned by him, and situate in British India—Maintenance—Charge on immovable property—Benefits to arise out of land—General Clauses Consolidation Act (I of 1868) s. 2, cl. 5—Civil Procedure Code (Act X of 1877), Chap XXVIII, s.* 433.] The Rajah of Hill Tipperah is a Sovereign Prince within the meaning of Chapter XXVIII of Act X of 1877, and cannot be sued personally in the Courts or British India except under the conditions specified in s. 433 of that Act. The fact of a defendant not subject to the jurisdiction of a Court having waived his privilege in previous suits brought against him does not give the Court jurisdiction to entertain a suit against him in which he pleads that he is not subject to such jurisdiction. A suit for maintenance which seeks to have the maintenance made a charge on immovable property is not a suit on immovable property within the meaning of clause c, s. 433, Act X of 1877, nor is it a suit for "benefits to arise out of land" within the meaning of the definition of the words "immovable property" contained in Act I of 1868, s. 2, cl. 5. A claim for maintenance is not a charge upon immovable property A member of the royal family of Hill Tipperah brought a suit against the Rajah to have it declared that with respect to certain land situate within British India, and forming portion of the possessions of the Rajah, he was entitled to the post of juboraj, and to succeed to such land on the death of the Rajah, and also claimed maintenance, and sought to have it declared that such maintenance should be a charge on the revenues of the lands situate in British India. *Held*, that the British Courts had no jurisdic-

Jurisdiction—*continued.*
tion to entertain the suit, it not being one for immovable property. BEER CHUNDER MANIKKYA *v.* RAJ COOMAR NOBODEEP CHUNDER DEB BURMONO 555

——— **Extension of.** *See* SMALL CAUSE COURT PRESIDENCY TOWNS .. 478

——— **of Commissioners.** *See* NAWAB NAZIM'S DEBTS ACT, 1873 ... 704

——— **of High Court** *See* REVISION 513

——— **Revenue Court**—*Act X of 1859 s. 28—Surety for payment of rent—Decree, Form of.*] In a suit for arrears of rent in a Revenue Court under Act X of 1859, the lessors joined as defendants the lessee, and another person whom they alleged to be a surety for the payment of the rent. An *ex-parte* decree was made in favour of the plaintiffs, but it did not expressly make the alleged surety liable for the money awarded. In execution of the decree certain of the alleged surety's land was sold, and the decree-holders were the purchasers at the sale. An application under Beng. Act VII of 1876 for the registration of their names as proprietors of the land purchased having been rejected, the decree-holders brought the present suit to establish their title to, and to recover possession of, the land. *Held* that the plaintiff's title was bad on the ground that the decree did not purport to bind the surety for the payment of the money awarded, and on the ground that a Revenue Court is not competent to entertain a suit against a person who has become surety for payment of rent. BHUGWAN CHUNDER ROY CHOWDHRI *v.* MANICK BIBEE 383

——— *Question of Title—Registration of names—Declaratory decree, Suit for.*] It is not the province of a Revenue Court to decide questions of title between contending claimants, such questions being within the province of the Civil Courts. It is the duty of the latter in suits brought for declaration of a right to registration to declare the rights of parties in order that the revenue authorities may be duly certified as to the persons whom they ought to register. JUGUT SHOBHUN CHUNDER *alias* DOOLAL CHUNDER DEHINGUR GOSSAMY *v.* BINAUD CHUNDER *alias* SODA SHOBHUN CHUNDER DEHINGUR GOSSAMY 925

Jury. Verdict of. *See* CRIMINAL PROCEDURE CODE, 1872, s. 243 58

Kabuliat. Construction of—*Abatement of rent for land acquired by Government for public purposes.*] In a suit for rent by a zemindar against a patnidar, the latter claimed abatement of the rent on the ground that part of the land included in the patni tenure had been acquired by the Government for public purposes. The kabuliat, executed by the patnidar contained a provision to the effect that, if any of the land settled should be taken up by Government for public purposes, the zemindar and the patnidar should divide and take in equal shares the compensation money, and a further provision to the effect that the patnidar should "make no objection on the score of diluvion or any other cause to pay the rent fixed or reserved by this kabuliat" *Held*, that the patnidar was entitled to abatement of the rent. UMA SUNKUR SIRKAR *v.* TARINI CHUNDER 571

Kabuliat, Construction of—*continued.*

Land acquired by Government for public purposes. *See* KABULIAT, CONSTRUCTION OF 571

——— **let for purposes of clearing.** *See* ENHANCEMENT OF RENT 505

——— **Acquisition Act** (X of 1870,) ss. 15, 39—*Second Appeal—Dispute as to right to compensation.*] Where a dispute as to the right of one of two claimants to certain compensation awarded under the provisions of the Land Acquisition Act has been referred to the Civil Court under s. 15 of that Act, a second appeal will lie to the High Court from the judgment passed in an appeal against the decision of the Court to which the dispute was referred. ATRI BAI *v.* ARNOPOORNA BAI 838

——— **Registration Act,** 1876, s. 55. *See* EVIDENCE ACT, s. 35 431

Lands purchased by widow out of Income of Life Estate. *See* HINDU LAW, INHERITANCE 758

Landlord and Tenant. *See* BENGAL ACT VIII OF 1869, s 27 147

——— *See* BENGAL ACT VIII OF 1869, s. 52... 88

——— *See* INSOLVENCY 855

——— *See* LIMITATION 280, 711

——— *See* LIMITATION ACT 1877, ART 139... 411

——— *See* LIMITATION ACT, 1877, ARTS. 139, 144 ... 367

——— *See* ONUS PROBANDI 813

——— *See* SALE FOR ARREARS OF RENT 722

——— *Cultivation—Changing character of lands—Forfeiture—Mandatory injunction*] Where a tenant has been guilty of a breach of duty in the use of his land, such as making a tank in it, building on it improperly, or changing the character of the cultivation, such conduct does not necessarily operate as a forfeiture so as to render the tenant liable to ejectment. The tenant of an

Landlord and Tenant—*continued.*
agricultural holding planted his jote with mango trees to the knowledge, but without the consent, of his landlord, thus changing the character of the land. More than three years afterwards the landlord sued for a mandatory injunction to have the mango trees removed. *Held*, that having stood by for more than three years and allowed the tenant to spend his labour and capital upon the land without taking any action in the matter, the landlord was not entitled to a mandatory injunction. NOYNA MISSER *v.* RUPIKUN ... 609

——————— *Cuttack, Tenures in—Surboraksri tenures—Alienation without consent of landlord—Forfeiture, Alienation by one of several co-sharers.*] The alienation of a surboraksri tenure in Cuttack, and *à fortiori* the alienation of any portion of such tenure, is invalid without the consent of the landlord. Assuming that the sale of such a tenure would entitle the landlord to re-enter as upon a forfeiture, the sale of a portion thereof by one of several co-sharers would not work a forfeiture of the whole tenure. DASSORATHY HURI CHUNDER MAHAPATTRA *v.* RAMA KRISHNA JANA 526

——————— *Enhancement—Presumption—Beng. Act VIII of 1869, ss. 3, 4.*] Section 4, Beng. Act VIII of 1869, entitles the holder of land for the time being, however he may have acquired it, to the benefit of the presumption prescribed in that section if he can show that there has been a continuous and uniform payment of the same rent for twenty years. TIRTHANUND THAKOOR *v.* HERDU JHA 252

——————— *Dur-maurasi Mokurari Tenure—Notice of Relinquishment—Surrender of Lease*] A tenure under a dur-maurasi mokurari lease of land, which is not let for agricultural purposes, cannot be put an end to by a mere relinquishment, on the part of the lessee, although after notice to the landlord. *Per* FIELD, J.—The principle laid down in the case of *Heera Lall Pal* v. *Neel Monee Pal*, 20 W. R., 383, where it was held that a patnidar cannot, of his own option, relinquish his tenure, is applicable to all intermediate tenures between the zemindar and the cultivator of the soil, except those held on farming leases. JUDOONATH GHOSE *v.* SCHOENE KILBURN & CO. 671

——————— *Ejectment—Right of Occupancy—Forfeiture—Beng. Act VIII of 1869, s. 52.*] The mere omission to pay rent for five years does not of itself amount to forfeiture of a ryot's right of occupancy, and will not be sufficient to sustain an action by the landlord for the recovery of the ryot's holding. A ryot having a right of occupancy cannot be legally ejected, unless under an order regularly obtained under s 52 of the Rent Law, that is, under a decree for arrears of rent unsatisfied within fifteen days from the passing of the decree. MUSYATULLA *v.* NOORZAHAN ... 808

——————— *Forfeiture—Waiver by acceptance of Rent.*] A lease provided that every four years a measurement should be made either by the lessor or by the lessees, and additional rent paid for accretion to the land leased. It then provided for failure on the lessee's part to execute a kabuliat for the excess lands in the following terms: "If at the fixed time stated above we do not take an amin and cause measurement to be made you will appoint an amin and cause the entire land of the said chur to be measured, and no objection on the ground of our recording or not our presence on such measurement chitta shall be entertained, and we will duly file a separate dowl kabuliat for the excess rent that will be found after deducting the settled land of the dowl executed by us from the land settled therein. If we do not, we will be deprived of our right of obtaining a settlement of such excess land, as well as of the land which will accrete in future to the said chur, and no objection thereto on our part shall be entertained." In a suit by the lessor, alleging that in 1876 he had caused a measurement to be made, and had called on the lessees to execute a kabuliat for the rent of certain excess lands, and praying that the lessees might be ejected, the lessees pleaded that the lessor had waived his right to enforce the forfeiture by subsequent receipt of rent. It appeared that payments had been made to the lessor by the lessees, which were accepted as rent, but were kept in suspense, subject to payment by the lessees of the "remaining amount." *Held*, that such a qualification did not make the payments anything else than payments of rent, and that the lessor had waived his right to insist on re-entry on the lessees' failure to measure the lands, or execute a kabuliat when called on to do so. *Davenport* v. *The Queen*, L. R., 3 App Cas, 155, followed. KALI KRISHNA TAGORE *v.* FUZLE ALI CHOWDHRY 843

——————— *Notice to Quit—Reasonable Notice.*] A tenant other than an occupancy ryot is entitled to a reasonable notice to quit. What is a reasonable notice is a question of fact, which must be decided in each case according to the particular circumstances and the local customs as to reaping crops and letting land. It is not necessary that the notice must expire at the end of the year. *Jenno Mundul* v. *Brijo Singh*, 22 W. R., 548 and *Rajnidonath Mookhopadhya* v. *Bassidhr Rahman Khondkar*, I. L. R., 2 Calc. 146, considered. JAGUT CHUNDER ROY, *alias* BASHI CHUNDER ROY v RUP CHAND CHANGO .. 48

——————— *Settlement with tenant containing a clause for re-entry—Compensation in lieu of rent—Use and Occupation—Trespassers*]

Landlord and Tenant—*continued.*
The plaintiff made a settlement of certain land with *A* and *B* for five years, there being in the settlement a stipulation that if the tenants failed to pay rent the plaintiff might accept another tenant. *A* died during the tenancy, and *B* left the place and the property without paying rent, and thereupon the plaintiff entered into possession of the property and held khas possession of it for two years, when he in 1870 entered into a settlement of it with defendant No. 1 for six years. In 1878 *B* died, and defendants Nos. 2 and 3 alleging themselves to be the chela and dasiputra of *B* took upon themselves to collect rent from the tenants. The plaintiff thereupon brought a suit against the three defendants, treating them as trespassers, but at the same time asked for the amount of rent due and for eviction. *Held*, that defendants Nos. 2 and 3 had no right on the property at all, and that defendant No. 1, who might have been considered as holding over after the expiration of his lease, if he had been in actual sole possession, should not be made liable for the whole rent when defendants Nos. 2 and 3 were in possession as much as he was, but that as the plaintiff had elected to waive the trespass, all the defendants might, on the authority of *Ramee Lalun Mones v. Sona Mones Dabee*, 22 W. R., 335, and *Lukhee Kant Lass Chowdhry v. Sumseruddi Lusker*, 13 B. L. R., 248; 21 W. R., 208, be treated as tenants, and a decree for use and occupation given against them. SUNNOMOYEE v. DINONATH GIR SUNNYASEE 908

——— *Suit for Rent—Contract to pay for Excess Land after Measurement—Notice of Enhancement—Rent Act (Beng. Act VIII of 1869), s. 14.]* When a tenant contracts to pay rent at a certain rate for any such land as upon measurement may be found to be in excess of the estimated area, it is not necessary to serve him with notice under s. 14 of the Rent Act before instituting a suit for the rent of any additional land, nor is it necessary that he should be present at the measurement. DWARKANATH v. BABURAM LASKAR 72

——— *Suit for Rent—Registered owner. Suit by, where the relationship of landlord and tenant is not shown to exist—Beng. Act VII of 1876, s. 78.]* The mere fact of a person being registered under the provisions of Beng. Act VII of 1876 as proprietor of the land in respect of which he seeks to recover rent is not sufficient to entitle him to sue for it. Where a landlord who was registered as owner of the land in respect of which he claimed rent, sued the occupier for such rent, but was only able to prove the fact that he was the registered owner, and was unable to show that the relationship of landlord and tenant existed, or that he had a good title to the estate of which he was the registered owner. *Held*, that the suit was rightly dismissed. RAMKHISYO DAS v. SHEIKH HARAIN 517

Lease. *See* REGISTRATION ACT, 1877, *s.* 17 865

Lease Surrender of. *See* LANDLORD AND TENANT 671

Leave to sue. *See* ACT XX OF 1863, *s.* 14 133

——— *See* CIVIL PROCEDURE CODE, 1877, *s.* 30 604

Legacy Suit for. *See* LIMITATION ACT, 1877, ARTS. 49 AND 123 79

Letters Patent, 1865, cl. 15—*Judgment—Appeal—Refusal to transmit order of Privy Council for execution.]* A decision by the Judge appointed to dispose of matters relating to appeals to Her Majesty in Council, refusing to transmit for execution her order restoring a decree, is a judgment within the meaning of s. 15 of the Letters Patent of 1865, and is appealable to the High Court. *Held*, also, that a refusal to transmit such an order for execution was not a misapprehension on the part of the Judge of the extent of his jurisdiction, although, if it had been, this itself would have been a ground of appeal HURRISH CHUNDER CHOWDHRY v. KALISUNDERI DEBI ... 482

Liability of Public Servant—*Injury done by his act illegal though bonâ-fide—Act XVIII of 1850—Protection of Judicial Officers—Cantonments' Act (XXII of 1864) s. 11—Lunatic Asylums Act (XXXVI of 1858) s. 4.]* Act XVIII of 1850 is for the protection of Judicial Officers, acting judicially and of officers acting under their orders. An officer commanding in Cantonments, acting *bonâ fide* in the discharge of his public duty, and under the belief that a person was dangerous by reason of insanity, caused him to be arrested, in order that he might be examined by medical officers, and caused him to be detained in his house for that purpose, he not being a dangerous lunatic. The medical officers, while reporting him sane, recommended that he should be placed under the observation of the civil-surgeon of the station, for which purpose the same officer caused his further detention. The Commanding Officer, who, under Act XXII of 1864, s. 11, had control and direction of the police in the Cantonment, did not proceed, or intend to proceed, under s. 4 of Act XXXVI of 1858. *Held*, that, although his belief might have justified the Commanding Officer, if he had proceeded under the provisions last mentioned, yet he not having done so, and not having any legal authority for what he had done, was not protected from liability in respect of the above acts. SINCLAIR v. BROUGHTON ... 841

Liability of Sons in Joint Family not made parties. *See* CIVIL PROCEDURE CODE, 1882, *s.* 283 888

Licensed Vendor. *See* BENGAL EXCISE ACT, 1878, ss. 53, 60, 61... ... 847

Lien—*Unpaid Vendor—Creditor of Vendor, Right of, to Lien.]* Although an unpaid vendor holds

Lien—*continued.*
a lien upon property sold for the consideration-money, yet a creditor of that vendor cannot claim the same right. HARI RAM v. DENAPUT SINGH... ... ...* ... 167

—— of Mortgages. *See* MORTGAGE ... 651

Limitation. *See* EXECUTION OF DECREE 857

—————— *See* ONUS PROBANDI 125, 130

—————— *See* POSSESSION ... 744

—————— Application for execution barred by. *See* RES-JUDICATA . 65

—————— Question of. *See* APPELLATE COURT, POWER OF 635

—————— *Bengal Act VIII of* 1869, *s.* 27—*Landlord and Tenant—Possession, Suit for on dispossession by Landlord—Title, Claim for declaration of.*] Where a suit by a tenant against his landlord is both in form and substance one to recover possession on the ground of illegal dispossession by the landlord, and no question of the plaintiff's title is raised, the insertion in the plaint of a claim for declaration of the plaintiff's title is not sufficient to prevent the application of the limitation prescribed by s. 27 of Bengal Act VIII of 1869. *Mussamut Dhurjobutty Chowdrain v. Chamroo Mundul*, 25 W. R., 217, distinguished. IMAM BUKSH MONDUL v. MOMIN MONDUL 280

—————— *Bengal Act VIII of* 1869, *s.* 27—*Suit for possession—Title.*] The limitation provisions of *s.* 27, Bengal Act VIII of 1869, have no application to a case in which the plaintiff relies upon his title, and seeks to recover possession upon the strength of that title, and in which the defendant denies that title. *Guroo Doss Roy v. Ramnarain Mitter*, B. L. R. Sup. Vol., 628; 7 W. R., 186; *Nistarinee* v. *Kali Pershad Doss Chowdhry*, 21 W. R., 53; and *Nilmadhub Shaha v. Shimbash Kurmokar*, I. L. R., 7 Calc., 442, referred to. JOYUNTI DASI v. MAHOMED ALLY KHAN 423

—————— *Bengal Act VIII of* 1869, *s.* 29—*Suit for arrears of rent.*] After the expiration of the period prescribed by *s.* 29 of the Bengal Act VIII of 1869, a plaintiff suing for arrears of rent cannot insist on the pendency of another suit, brought by him for possession of the land, as preventing limitation from running, where there has been no time during which such rent could not have been recovered if he had acted on his right of suing for it. In *Ram Surnomoyee v. Shoshee Mookhee Burmonee*, 12 Moore's I. A., 244; S C, 2 I. L. R., P C., 10, the claimant of rent was, until the setting aside of the sale that had taken place, in the position of a person whose claim had been satisfied. The right to sue in that case had been suspended; and it was, therefore, distinguishable from the present. The plaintiff's ancestor purchased a taluk from the Government, subject to an ijara therein held by the defendants, which expired in 1866. A suit brought by the plaintiff in 1874 for possession was dismissed finally in 1876, the defendant's claim to remain in possession under another tenure being allowed. The plaintiff in 1876 sued the defendants for arrears of rent for the years 1866—1872. *Held*, that the suit was barred under *s.* 29, notwithstanding the proceedings of 1874. HURO PERSHAD ROY v. GOPAL DAS DUTT 255

—————— *Bengal Act VIII of* 1869, *s.* 30 *Suit to recover balance of tahsildar's account after dismissal—Special Agreement.*] The defendant was tahsildar of one of the plaintiff's zemindaries, and, after his dismissal on the 24th of August 1876, he submitted an account, which was found to be incorrect, and time was given to him to make good certain items on his executing an ikrar, promising to pay whatever balance should be found due from him to the plaintiff. In a suit brought on the 28th of October 1878, to recover the balance found on inquiry to be due,—*held* that *s.* 30 of Act VIII of 1869 had no application, the special agreement taking the case out of the scope of that section, and therefore the suit was not barred by reason of having been brought more than one year after the defendant's dismissal. BEER CHUNDER MANICKYA *v.* HURRO CHUNDUR BURMON 211

—————— *Bengal Act VIII of* 1869, *s* 58—*Landlord and Tenant—Execution of Decree—Instalments.*] On the 10th of July 1878, a rent-decree was passed in favour of certain parties for the sum of Rs. 168, payable in two equal instalments, on the 4th of June 1879 and the 30th of October 1879, respectively. On the 18th July 1881, the decree-holders applied for execution of the decree. *Held*, by the majority of the Full Bench (GARTH, C.J., and MITTER, J., dissenting) that the application was barred by limitation under the provisions of *s.* 58, Bengal Act VIII of 1869. *Gurseebullah Sircar v. Mohun Lall Shaha*, I. L. R., 7 Calc., 127; S. C. 8 C. L. R., 409, dissented from. MAMTAZUL HUQ v. NIRBHAI SING 711

—————— *Bengal Act VIII of* 1869, *s.* 58—*Rent Decree, Transfer of—Execution of decree, Application for.*] Where an application for the transfer of a rent decree for execution has been made and granted by the Court which passed the decree within three years from the date of the decree, but no application for execution is made to the Court to which the decree has been transferred within three years from the date of the decree, the execution of the decree will be barred by limitation, under the provisions of Bengal Act VIII of 1869, *s.* 58. BHOLANATH ROY *v.* NURENDRO NATH ROY 880

—————— Act (*IX of* 1871), *Art.* 15, (*XV of* 1877.) *Sched.* II, *Art.* 11—*Suit to recover Property sold in execution—Civil Procedure Codes (Act VIII*

Limitation Act—*continued.*
of 1859, s 246 and *Act X of* 1877, *ss.* 260, 281, *and* 282.] Certain property, which the plaintiff alleged to belong to her, was sold in execution of a decree obtained by the purchaser of the property at the auction-sale, against a third party. The plaintiff put in a claim to the property under *s.* 246 of Act VIII of 1859, which claim was rejected on the 6th *of* September 1873. The plaintiff, on the 10th of January 1878, brought a suit to recover possession of the property sold. *Held*, that the suit was not barred under Art. 11 of Sched. II of Act XV of 1877, which refers to the section in Act X of 1877, corresponding to s. 246 of Act VIII of 1859; and that the suit was not barred by Art. 15, sched. II of Act IX of 1871, the suit not being one to set aside a summary order within art. 15 of the schedule to that Act. *Koylash Chunder Paul Chowdhry v. Premnath Roy Chowdhry*, followed. LUCHMI NARAIN SING *v.* ASHRUF KOER 48

——————1871, Art 140. *See* LIMITATION ACT 1877, ART. 141 ... 934

——————Art 418—*Suit for redemption of mortgage—Acknowledgment of title of mortgagor or of his right to redeem.*] An acknowledgment to be within the meaning of Art. 148, Sch. II, Act IX of 1871, must be an acknowledgment of a present existing title in the mortgagor. An acknowledgment of the original making of the mortgage deed and of possession having been taken under it, coupled with the allegation of the subsequent execution of two other deeds practically superseding the mortgage and altering the relation of the parties, contained in a written statement filed previous to the expiry of the 60 years allowed, is not a sufficient acknowledgment within the meaning of that article, so as to prevent limitation from operating. RAM DAS *v.* BIRJNUNDUN DAS *alias* LALOO BABOO... 616

——————Art. 167—*Execution of decree—Limitation applicable to execution of a decree passed previous to the 1st October* 1877—*Limitation Act XV of* 1877, *Art.* 179—*General Clauses Consolidation Act (1 of* 1868) *s.* 6, *Effect of.*] In execution of a decree, dated the 17th January 1877, the judgment-creditor applied on the 13th May 1878 to have the property of his judgment-debtor sold on the 16th September 1878. Subsequently on the 2nd June 1881 he made a further application to have the decree executed. *Held*, that the case was governed by the provisions of Art. 167 of Act IX of 1871, and not by those of Art. 179 of Act XV of 1877; and that as the application had not been made within any one of the periods given in the third column of Art. 167, it was barred by limitation. *Held*, also, following *Mungul Pershad Dichit v. Grija Kant Lahuri*, I. L. R. 8 Calc., 51, that although there is no corresponding provision in Act XV of 1877 to that contained in *s.* 1 of Act IX of 1871, all applications for execution of a decree are applications in the suit which resulted in that decree. *Held*, further, that under *s.* 6 of Act I of 1868 the repeal of Act IX of 1871 by Act XV of 1877 does not affect any proceedingt commenced before the repealing Act came into force. *Re Ratanee Kalanji*, I. L. R., 2 Bombs, 148, followed. BEHARY LALL *v.* GOBERDHUN LALL 446

——————1877. *See* PARTIES ... 355

——————*s.* 41. *See* APPELLATE COURT, POWER OF 635

——————*See* CIVIL PROCEDURE CODE, 1882, *s.* 561 631

Limitation Act, *s.* 7—*Minor Plaintiff—Application for Execution by Guardian.*] A plaintiff, who has obtained a decree during his minority, has the option either of applying through his guardian to execute the decree during his minority or to wait until the expiration of his minority before executing his decree. The application of the guardian is the application of the infant. The minor is under disability during the whole period of his minority. His disability does not cease, because he, through his guardian, makes two or more applications for execution however long the interval between them, provided they are all made during his minority. MON MOHUN HUKEEE *v.* GUNGA SOONDERY DABEE ... 181

——————*Minority—Right to Sue—Personal exemption—Assignment by Minor.*] Under *s.* 7 of the Limitation Act, a minor has, in respect of a cause of action accruing during his minority, a right to sue at any time within three years of attaining his majority; but if during his minority, or if after attaining his majority and within three years thereof, such person assigns all his right and interests to a third party, who is *sui juris*, the latter cannot claim the exemptions accorded to the minor by s. 7 of the Limitation Act, but is subject to the ordinary law of limitation, governing suits in which relief of the same nature is claimed. RUDRA KANT SURMA SIRCAR *v.* NOBOKISHORE SURMA BISWAS, AND SAMOD ALI *v.* MAHOMED KASSIM AND OTHERS 668

——————*s* 26—*Dispossession—Fishery—Custom—Suit to restrain fishing in certain Bhils.*] In a suit to restrain the defendants from fishing in certain bhils, which admittedly belonged to the plaintiff's zemindari, it appeared that the plaintiff had let out some of the bhils to ijaradars who had sued the defendants for the price of fish taken by them from the bhils, and that the suit had been dismissed, on the ground that the defendants, in common with other inhabitants of the villages in the zemindari, had acquired a prescriptive right to fish in the bhils. The defendants contended that they had been in posses-

Limitation Act—*continued.*
sion of the bhils for more than 12 years, and that they had a prescriptive right to fish therein, under a custom according to which all the inhabitants of the zemindari had the right of fishing. *Held*, that the mere fact that the defendants had trespassed and had misappropriated fish did not amount to a dispossession of the plaintiff, and that the suit was not barred by limitation. *Parbutty Nath Roy Chowdhry* v. *Mudho Paroe*, I. L. R. 3 Calc., 276, distinguished. *Held*, also, that no prescriptive right of fishery had been acquired under s. 26 of the Limitation Act, and that the custom alleged could not, on the ground that it was unreasonable, be treated as valid. *Lord Rivers* v. *Adams*, L. R. 3 Ex. D., 361, followed. LUTCHMEEPUT SINGH *v.* SADAULLA NUSHYO 698

——————, 1877, ART. 11.
See LIMITATION ACT, 1871, ART 15 ... 43

—————— ART. 11—*Suit for Possession—Civil Procedure Code (Act VIII of 1859), s. 246.*] Where, in consequence of an adverse order passed under the provisions of Act VIII of 1859, s. 246, a suit is [since the Limitation Act (XV of 1877) came into force] instituted to establish the plaintiff's right to certain property and for possession, such suit is not governed by the provisions of art. 11, sched II of Act XV of 1877, but by the general limitation of twelve years. *Koylash Chunder Paul Chowdhry* v. *Prosnath Roy Chowdhry* (I. L. R., 4 Calc., 610; 8 C. L. R., 25), *Matonginy Dassee* v. *Chowdhry Jwanujoy Mullick* (25 W. R., 518), *Joyram Loot* v. *Panirram Dhoba* (8 C. L. R., 54), and *Raj Chunder Chatterjee* v. *Shama Churn Gorai* (10 C L. R., 435) cited. GOPAL CHUNDER MITTER *v.* MOHESH CHUNDER BORAL 230

——————, ARTS. 11 AND 120—*Civil Procedure Code Act VIII of 1859, s. 246; Civil Procedure Code, Act X of 1877, s. 283—Suit to establish title to Property after rejection of Claim.*] The defendants attached certain property, which the plaintiffs alleged belong to them. The plaintiffs preferred a claim to the property under s. 246 of Act VIII of 1859: this claim was disallowed on the 15th August 1877. *Held*, that the order of the 15th August 1877 not being an order passed under s. 283 of Act X of 1877, art. 11 of sched. II of Act XV of 1877 did not apply, but that art. 120 was applicable BISSESSUR BHUGUT *v.* MURLI SAHU 168

—————— ARTS. 49 AND 123—*Suit for Specific Moveable Property—Suit for a Legacy.*] A testator bequeathed certain specific movable property to *A*. *B* applied for and obtained a certificate under Act XXVII of 1860 on behalf of the testator's widow, and took possession of the property bequeathed. *A* appealed, and the case was remanded for retrial. On the 27th of March 1873, the former order was cancelled and a certificate was granted to *A*. On the 19th of August 1873, *B* was directed to deliver up the property to *C*, who had purchased it from *A*. On the 22nd of March 1876, *C* instituted a suit to recover the property. *Held*, that the suit was barred under art. 49 of the Limitation Act. Article 123 of the Limitation Act only applies to cases in which the property sought to be recovered is not only a legacy, but is also sought to be recovered as such from a person who is bound by law to pay such legacy, either because he is the executor of the will or otherwise represents the estate of the testator. ISSUR CHUNDER DOSS *v.* JUGGUT CHUNDER SHAHA 79

——————, 1877, ART. 120.
See LIMITATION ACT, 1877. ART. 11. ... 163

—————— ART. 120—*Suit for ejectment—Claim to compel Defendant to remove trees from Land granted to him for Agricultural purposes.*] Article 120 of sched. II of Act XV of 1877 is applicable to an alternative claim, put forward in a suit for ejectment, to compel the defendant to remove trees from certain lands leased to him for agricultural purposes. GUNESH DASS *v.* GONDOUR KOORMI 147

——————, ART. 123.
See LIMITATION ACT, 1877, ART. 49 ... 79

——————, ART 127.
See HINDU LAW, JOINT FAMILY ... 237

——————, ART. 132—*Suit for arrears of maintenance charged upon Immovable Property.*] An allowance for the maintenance of a younger member of a family was charged upon the inheritance to which the eldest male member above succeeded. *Held* that, a suit for arrears of such maintenance, within twelve years, is within time under Act XV of 1877. AHMAD HOSSEIN KHAN *v.* NIHALUDDIN KHAN 945

Limitation Act, ART. 138.
See POSSESSION, SUIT FOR ... 602

—————— ART. 139—*Ghatwal—Adverse possession—Limitation in suit by landlord against tenant of permanent tenure.*] Where a permanent tenure has been granted by a ghatwal, if the successor of such ghatwal, being one of the ghatwals to whom Regulation XXIX of 1814 applies, wishes to resume that tenure, he must bring his suit within twelve years after succeeding to the ghatwali estate. The possession of the tenant is adverse to him from the time of the decease of his immediate predecessor. Article 139, Sch. II of Act XV of 1877, regarding suits by landlords to recover possession from tenants giving twelve years time from the determination of the tenancy, does not apply to cases in which the plaintiff seeks to recover a tenure permanent in its nature and not determinable by notice. MODHO KOOERY *v.* TEKAIT RAM CHUNDER SINGH 411

Limitation Act, 1877, ARTS. 139, 144—*Landlord and Tenant—Suit for possession—Cause of Action.*] The plaintiff stated that in the year 1862 he purchased a taluk in which some of the defendants then held an ijara for a term of years expiring in 1868. The taluk had previously been a khas mehal in the possession of the Government, and was bought by the plaintiff at an auction sale held by the Collector The plaintiff also stated that the ijaradar defendants, in collusion with the other defendants, had continued in possession of the lands held in ijara after the term of the ijara had expired, and had refused to give up possession thereof to the plaintiff The Judge of the lower Appellate Court found that the defendants (other than the ijaradars) had been in possession previously to the sale in 1862, and he also found that there was no evidence to support the charge of collusion with the ijaradar defendants. He therefore dismissed the suit, (which was brought in 1880) on the ground of limitation. *Held*, on second appeal, that the plaintiff's cause of action arose on the expiration of the ijara, and that the suit, whether governed by Article 139 or 144 of the Limitation Act, Act XV of 1877, was not barred on the ground of limitation. WOOMESH CHUNDER GOOPTO *v.* RAJ NARAIN ROY, 10 W.R., 15, cited KRISHNA GOBIND DHUR *v.* HARI CHURN DHUR 367

——— ART. 141—*Act IX of* 1871, *Sch II Art.* 140—*Suit by Reversioner for possession.*] Under Article 141 of Schedule II, Act XV of 1877, a reversioner who succeeds to immovable property has twelve years to bring his suit for possession from the time when his estate falls into possession. SRINATH KUR *v.* PROGONNO KUMAR GHOSE 394

——— *Alienation by Hindu Widow—Adverse Possession*—A title by adverse possession for more than twelve years accrues even during the life time of a Hindu widow, but if possession arises directly from any invalid alienation on her part special provision is made for the right to sue on the part of the reversioner within twelve years from her death and the accrual of their titles. GYA PERSAD *alias* LALL PERSHAD *v.* HIRI NARAIN... 93

——— ART. 164—*Code of Civil Procedure* (*Act X of* 1877), *s.* 108—*Ex-parte Decree—Setting aside ex-parte Decree.*] An *ex-parte* decree was obtained against a defendant who applied to have it set aside under s 108 of the Civil Procedure Code. The application was made more than thirty days from the date of attaching the defendant's property in execution of the decree, but within thirty days of the service of the sale proclamation. *Held*, that the application was barred by limitation under Art. 164, Sch II, Act XV of 1877. IN THE MATTER OF BHAGBUNSHUNY. BHAGBUNSHUNY *v.* JUDOBENDRA NARAIN MULLICK 869

Limitation Act, 1877, ART. 176.
See ARBITRATION 575

——— ART 179.
See LIMITATION ACT, 1871, ART. 167 ... 446

——— ART. 179, *para* 2—"*Appellate Court*"—*Appeal*] The meaning of paragraph 2 to Art. 179 of the 2nd schedule of Act XV of 1877 is, that, where there has been an appeal, the period of limitation is to run from the date when the Court to which that appeal has been preferred passes an order disposing of the appeal. The words 'Appellate Court' signify the Court or Courts to which the appeal, mentioned in the article, has been preferred. WAZIR MAHTON *v.* LULIT SINGH 100

——— ART 179—*Execution of Decree—Partition—Joint Decree—Decree for Partition.*] A consent decree for partition made between three parties contained a provision that if the plaintiffs should not have the property partitioned within two months from the date thereof, any one of the other parties to the suit might obtain partition by executing the decree. One of the parties sued out execution and obtained partition and possession of his own share. More than three years after the date of the decree but less than three years from the date of the application just mentioned, another of the parties applied for partition under the decree. *Held*, that the application was not barred by limitation under the provisions of the Limitation Act, Act XV of 1877, Sch. II, Art.179, cl. 3, exp. 1. MOHUN CHUNDER KUMMOKAR *v.* MOHES CHUNDER KUMMOKAR ... 568

——— ART. 179—*Execution of Decree, Application for—Step in aid of Execution—Repeal, Effect of.*] On the 28th September 1877 an application was made for execution of a decree. On the 8th July 1878 the decree-holder deposited Rs. 2 as Nilamee fees, that is to say, costs for bringing certain property to sale in execution of the decree. On the 28th March 1881 a further application for execution of the decree was made. *Held*, that the deposit of Rs. 2 as Nilamee fees on the 8th July 1878 was a step in aid of execution of the decree, and that the application of the 28th March 1881, being within three years from the date of the deposit, was not barred by limitation. *Quære.*—Whether, inasmuch as Act IX of 1871 is repealed by Act XV of 1877, and the later Act contains no provision similar to that contained in s. 1 of Act IX of 1871, Act XIV of 1859 can be said to have been repealed in respect of suits instituted before the 1st of April 1878. RADHA PROSAD SINGH *v.* SUNDUR LALL ... 644

——— ART. 179, CL. 4—*Application for execution of decree by benamidar.*] An application for execution of a decree by a mere benamidar is not an application *in accordance with law* within the meaning of Art. 179, Cl. 4 of Sch. II of the

Limitation Act—*continued.*
Limitation Act (XV of 1877), such as to afford a fresh starting point for limitation. DENO NATH CHUCKERBUTTY *v.* LALLIT COOMAR GANGOPADHYA 633

——— ART. 170—*Execution of Decree. Application for—Acknowledgment in writing.*] The mere payment of a Court-fee in connection with execution proceedings, with a view to obtain leave to bid for property then up for sale in execution of a decree, does not constitute "the taking of some step in aid of execution" within the meaning of Art. 179, Sch. II of the Limitation Act (Act XV of 1877), so as to prevent the execution of the decree being barred within three years from the date of such payment. An application for the execution of a decree is an application in respect of a "right" within the meaning of s. 19, Act XV of 1877, and a petition made by a judgment-debtor, and signed by his vakeel, praying for additional time for payment of the amount of a decree, constitutes an "acknowledgment of liability" within the meaning of that section, and a new period of limitation should be computed from the date of such petition in order to ascertain whether the execution of the decree is barred or not under the provisions of Art. 179, Sch. II of the Limitation Act. *Ramhit Ras* v. *Satgur Rai*, I. L. R., 3 All., 247; and *Ram Coomar Kur* v. *Jakur Ali*, I. L. R., 8 Calc., 716, followed. TORER MAHOMED *v.* MAHOMED MABOOD BUX 730

Local Investigation. *See* EVIDENCE ... 363

Lunatic Asylums' Act, 1858. s. 4.
See LIABILITY OF PUBLIC SERVANT ... 841

Magistrate. Attachment and Sale by.
See ABSCONDING OF ACCUSED ... 861

——— **Jurisdiction of.** *See* CRIMINAL PROCEDURE CODE, 1872, s. 518 ... 103

Mahomedan Law, Endowment—*Wuqf—Provisions for payment of debts and maintenance.*] A Mahomedan created a *wuqf* of all his property, and appointed his minor grandson mutwali, providing that, during the minority the property should be managed by the minor's father. The deed contained a provision that in the first place, certain debts should be paid, and then provided that the property should be applied towards the religious uses created and the maintenance of the settlor's grandsons and their male issue. In execution of a decree against the minor's father, the endowed property was attached and sold. In a suit by the minor through his sister, as guardian, to recover possession of the property, *Held*, that, notwithstanding the provisions for payment of the debts and maintenance, the *wuqf* was valid, LUTCHMIPUT SING *v.* AMIR ALUM ... 176

Mahomedan Law, Gift—*Requisites of Gift—Gift in future.*] Under the Mahomedan law a gift is not valid unless it is accompanied by possession, nor can it be made to take effect at any future definite period. A document containing the words, "I have executed an ikrar to the effect that, so long as I live I shall enjoy and possess the properties, and that I shall not sell or make gift to any one, but after my death you will be the owner, and also have a right to sell or make a gift after my death. *Held*, to be an ordinary gift of property *in futuro* and as such invalid under Mahomedan law. YUSUF ALI *v.* COLLECTOR OF TIPPERA 138

——— **Guardian**—*Minor—Certificate of Guardianship.*] Under the Mahomedan law the brother of the mother of a female minor, whose parents are dead, is entitled, in preference to a mere stranger, to the guardianship of the property of the minor, unless it be shown that he is in some way unfit to take charge of such property. IN THE MATTER OF THE PETITION OF IMAM BUKSH. IMAM BUKSH *v.* THAKOO BIBEE ... 599

Maintenance, Suit for. *See* JURISDICTION 535

——— *See* RES-JUDICATA 945

——— **arrears of.**
See LIMITATION ACT, 1877, ART. 132 945

Majority. *See* ACT XL OF 1858, s. 3 ... 901

——— **Act, 1875,** s. 3. *See* ACT XL OF 1858, s. 3 901

Master and Servant—*Criminal act of Servant—Non liability of Master—Indian Ports Act (XII) of* 1875), *s.* 22] The servants of a contractor who had engaged to discharge ballast from a ship lying in the port of Calcutta threw the ballast into the river within the limits of the port, and thus committed an offence under s. 22 of the Indian Ports' Act (Act XII of 1875). It did not appear that the contractor had abetted the offence. *Held*, that he was not, in the absence of proof of abetment, liable for the acts of his servant. CHUNDI CHURN MOOKERJEE *v.* THE EMPRESS 849

Maxim. Optimus Legis Interpres Consuetudo. *See* REGISTRATION ACT, 1871, s. 17 82

Measurement of Excess Land. *See* LANDLORD AND TENANT 72

——— **Chittas.** *See* EVIDENCE ACT, s. 83 741

Medical Witness. *See* EVIDENCE ... 455

Mesne Profits. *See* SALE IN EXECUTION OF DECREE 695

——— *Execution of Decree—Mesne Profits how estimated—Amount stated in Plaint—*

Mesne profits—*continued.*

Estoppel.] When, in a suit for possession of land and mesne profits at a rate stated in the plaint, a decree is passed which directs that the amount of mesne profits be ascertained in execution of the decree, the plaintiff is not limited to the amount or rate stated in his plaint, though it may be used as evidence against him in favour of the defendant. *Baboojan Jha* v. *Bynath Dutt Jha*, I. L. R., 6 Calc., 472; 7 C. L. R., 589 explained. GAURI PROSAD KOONDOO v. BEILY .. 112

Mesne Profits. Suit for. *See* CIVIL PROCEDURE CODE, 1859, *s.* 7 ... 283

Minor. *See* ACT XI of 1858, *s.* 3 ... 901

——*See* MAHOMEDAN LAW, GUARDIAN 599

——**Plaintiff.** *See* GUARDIAN ... 176

——*See* LIMITATION ACT, 1877, *s.* 7 181

——**Sons, Sale of Interest of.** *See* HINDU LAW, ALIENATION 495

——**Suit by.** *See* COMPROMISE OF SUIT 810

——*See* PRACTICE ... 629

Minority. *See* LIMITATION ACT, 1877, *s.* 7 663

Misjoinder—*Parties—Suit to recover property sold in execution of decree.*] Certain properties were sold to *A* by private contract. Subsequently the properties were attached in execution of a decree against *A's* vendors and sold in execution to various purchasers. *A* instituted a suit against his vendors, the decree-holders, and the purchasers, to set aside the execution sale. *Held*, that the suit was not defective by reason of misjoinder of parties. *Rajaram Tewari* v. *Luchman Persad*, B. L. R. Sup. Vol. 781; 8 W. R., 18, distinguished. HARANUND MOZOOMDAR v. PROSUNNO CHUNDER BISWAS 768

Mofussil Courts, Practice of. *See* EVIDENCE ACT, 1872, *s.* 35 586

Mokuraridar *See* MORTGAGE ... 643

Money Decree on Mortgage Bond. *See* MORTGAGE 851

Money paid in satisfaction of Joint Decree. *See* SMALL CAUSE COURT JURISDICTION 395

Mortgage. *See* EVIDENCE ACT, 1872, *s.* 92 ... ... 528, 898

——*Execution of decree—Apportionment of mortgage debt amongst properties mortgaged.*] It appearing that the mortgagee deliberately abstained from executing his decree against eleven properties which still remained in the possession of the mortgagor but proceeded against the one property which had passed out of the mortgagor's possession; the mortgage debt was directed to be apportioned between the twelve

Mortgage—*continued.*

properties, and the mortgagee was not to be allowed to take out execution against the property which had passed out of the mortgagor's possession, except for the amount which should be apportioned to such property, without satisfying the Court that he had made every possible effort to execute the remainder of his decree against the other eleven properties. RAM DHUN DHUR v. MOHESH CHUNDER CHOWDHRY 406

——*Money Decree on Mortgage Bond—Mortgagee's lien—Registration Act (XX of 1866), s. 53—Frame of suit—Parties.*] *A* and *B*, co-mortgagees, obtained a summary decree under the Registration Act XX of 1866, *s.* 53, on the 6th May 1868, in respect of certain property which was again mortgaged by the owner to *C* and *D* in March 1869. *C* and *D* having also obtained a decree on their mortgage brought the property to sale in execution of their decree and purchased it themselves in December 1874. *A* not having had the whole of his mortgage-debt satisfied instituted a suit on the 18th December 1879 against *C* and *D*, and the representatives of *B* (*B* having meanwhile died and his representatives not joining in the suit) to enforce his lien against the mortgaged property in the hands of *C* and *D*, and to recover the share of the mortgage-debt still due to himself alone. *Held*, that *A* did not acquire a better right to proceed against the property by reason of its having come into the hands of *C* and *D*, nor did *C* and *D* take subject to a greater burden than the mortgagor himself, and that as *A* had allowed his decree against the mortgagor to be barred by limitation, he had lost all right to proceed against the property by execution were it in the hands of the mortgagor, and consequently he could not be allowed to proceed against it by suit, merely because it was in the hands of third parties. *Syud Emam Montazooddeen Mahomed* v. *Ruj Coomar Dass*, 14 B. L. R., 408: S. C., 23 W. R., 187: and *Jeumenjoy Mullick* v. *Doorgamoney Dossee*, I. L. R., 7 Calc., 714: S. C. 9 C. L. R., 353, referred to. CALLY NATH BUNDOPADHYA v. KOONJO BEHARY SHAHA 651

——*Mortgagor and mortgagee—Covenant to repay, Absence of—Suit to recover money lent—Measure of damages—Costs.*] Two out of several co-sharers mortgaged as their own, by way of conditional sale, a portion of the joint family property. The mortgagee foreclosed, and then instituted a suit for possession, which he withdrew with liberty to bring a fresh suit. He afterwards brought a suit for possession against the mortgagors, and their co-sharers, on the suggestion of the mortgagors that it would be undefended. It was, however, defended by the co-sharers, and the suit was dismissed. The mortgage-deed contained no covenant to repay the money lent. In an action for damages

Mortgage—*continued.*
brought by the mortgagee against his mortgagors—*held*, that the plaintiff was entitled to recover the money lent and interest, and the costs of the second suit. BHUGWAN ACHARJEE *v* GOBIND SAHOO... 234

——— *Right to redeem—Mokurररदार—Regulation XVII of* 1806, *s.* 8—*Notice of foreclosure.*] The holder of a maurasi mokurari patta under the mortgagor is not a "representative" within the meaning of s. 8 of Regulation XVII of 1806, and is therefore not entitled to notice of foreclosure under that section. *Lalla Doorga Pershad* v. *Lalla Luchmon Sahoy*, 17 W. R., 272, followed SHIPOTI CHURN DEY *v.* MOHIP NARAIN SINGH 643

——— **Payment of**—*Extinction of charge—Intention of Parties—Presumption.*] Whether a mortgage, paid off, has been kept alive or extinguished depends upon the intention of the parties; the mere fact that it has been paid off not deciding the question whether or not it has been extinguished. Express declaration of intention will cause either the one result or the other, and in the absence of such expression, the intention may be inferred, either one way or the other. A lender of money upon a mortgage, which, however, having been made by a person not having authority to charge the greater part of the property included in it, was to that extent invalid, re'ied upon a charge effected in a prior paid off mortgage to another mortgagee of the same property. The balance due for the prior mortgage debt had been paid out of the money advanced on the later, and the prior instrument had come into the possession of the present mortgagee. *Held*, that it must be presumed, in the absence of any expression of intention to the contrary, that the borrower, who claimed to be the owner of the property which he attempted to charge, intended that the money should be applied in paying off and extinguishing the prior mortgage, there being no intermediate incumbrance It being also presumable that the lender lent the money upon the security of the later mortgage, he did not become entitled to an additional security, merely, because that which he had taken had thus proved invalid in part. *Held*, therefore, that the prior mortgage had been extinguished. MOHESH LAL *v.* BAWAN DAS ... 961

Mortgage Bond. *See* REGISTRATION ACT, 1877, s. 49 520

——— *See* SECOND APPEAL 309

——— **by Father of joint Family.** *See* CIVIL PROCEDURE CODE, 1882, *s.* 283 888

——— **Decree Directing Accounts, &c.** *See* DECREE 53

Moveable Property, Suit for specific. *See* LIMITATION ACT, 1878, ARTS. 49 AND 123... 79

Nawab Nazim's Debts' Act (XVII OF 1873) *Jurisdiction of Commissioners—Parties.*] The Commissioners appointed under the Nawab Nazim's Debts' Act XVII of 1873 (an Act to provide for the liquidation of the debts of the Nawab Nazim, and for his protection from legal process), having ascertained and certified that a certain zemindari was nizamut property, (*i.e.*, held by the Government for the purpose of upholding the dignity of the Nawab Nazim for the time being), the fact that this property had before the passing of the Act, been conveyed by the Nawab Nazim to his son, did not deprive the Commissioners of jurisdiction to deal with the question The plain language of s. 12 of the Act is not controlled by any words in the preamble. A suit brought by a claimant against the Government and the grantee to recover the property, without the Nawab Nazim having been joined as party, could not proceed OMRAO BEGUM *v.* THE GOVERNMENT OF INDIA ... 704

s. 11—*Agreement for appropriation of payments—Contract Act* (*IX of* 1872), *s.* 60—*Suit for Rent.*] So far as the Nawab Nazim's Debts' Act is concerned, rent due by the Nawab is on the same footing as any other debt incurred by him, and before his property can be made liable to satisfy such rent debt, the consent of the Governor-General in Council must first be obtained to the issue of execution. ROOKMINY BULLUB ROY *v.* MULK JAMANIA BEGUM... 914

Next Friend. *See* PRACTICE ... 629

Non-appearance, Dismissal of Suit for. *See* CIVIL PROCEDURE CODE, 1877, s. 103, 426. *See* RES-JUDICATA 426

Notice of Enhancement *See* ENHANCEMENT OF RENT, SUIT FOR ... 864

——— *See* LANDLORD AND TENANT 72

——— **Foreclosure.** *See* MORTGAGE 643

——— **Relinquishment.** *See* LANDLORD AND TENANT 671

——— **Sale.** *See* SALE FOR ARREARS OF RENT 931

——— **Proof of Publication of** *See* SALE FOR ARREARS OF RENT 619

——— **Publication of.** *See* SALE FOR ARREARS OF RENT 172

——— **to produce Original Document.** *See* EVIDENCE TAKEN ON COMMISSION 939

——— **Quit.** *See* LANDLORD AND TENANT 48

Nuisance *See* CRIMINAL PROCEDURE CODE, 1882, s. 133 687

Objection, Notice of. *See* CIVIL PROCEDURE CODE, 1882, s. 561 631

Objection taken for first time in Appeal. *See* APPELLATE COURT, OBJECTION TAKEN FOR FIRST TIME IN 945

Obstruction. Omission to remove. *See* BENCH OF MAGISTRATES, POWER OF 38

Offence committed out of British India. *See* JURISDICTION 288

Offences of the same kind committed in respect of different person. *See* JOINDER OF CHARGES 371

Official Assignee. *See* INSOLVENCY ... 855

——— **Assent of, to Sale.** *See* SALE IN EXECUTION OF DECREE... 217

Onus probandi. *See* HINDU LAW, JOINT FAMILY 237

——— *See* POSSESSION ... 744

———, *Suit for Possession—Evidence of previous possession.*] Where, in a suit for possession of land, the plaintiff proves merely that he has been in possession of the disputed land at some time within twelve years previous to the filing of the plaint, such evidence is not sufficient to throw upon the defendant the burden of proving his title to the land. *Wise* v. *Amirunnessa Khatoon* followed, and *Gour Paroy* v. *Wooma Soondurse Debia* cited. DEBI CHURN BOIDO v. ISSUR CHUNDER MANJEE 39

——— *Previous Dispossession—Limitation—Adverse Possession.*] In every suit for the recovery of land on the allegation of previous dispossession by the defendant, the plaintiff must start his case by showing that, at some time within twelve years previous to the institution of the suit, he has been in possession of the land sued for. *Raja Sahib Perhlad Sein* v. *Maharajah Brojendro Kishore Singh*, 12 Moore's I. A., 337; *Dawkins* v. *Lord Penrhyn*, 4 App. Cas., 51; and *Noyes* v. *Crawley*, 10 Ch. D., 31, 36, cited. BHOOTNATH CHATTERJEE v. KEDARNATH BANERJEE ... 125

——— Where, in a suit for the recovery of land, based on title, the plaintiff alleges that he has been in possession of the land and was dispossessed therefrom by the defendant within twelve years prior to the institution of the suit, mere proof of such possession will not be sufficient to entitle the plaintiff to a decree *Wise* v. *Ameerunnissa Khatoon*, L. R., 7 I A, 73, followed; and *Kawa Manji* v. *Khowar Nusrio*, 5 C. L. R., 278, disapproved. EETAZA HOSSEIN v. BANY MISTRY 130

———*Suit for possession of land—Presumption of possession and ownership.*] If in a suit for possession of land which was covered with water more than twelve years before the institution of the suit, the plaintiff proves that he exercised acts of ownership, as by letting out the julkur to tenants, that is

Onus probandi—*continued.*
primâ facie evidence of possession and ownership, and unless the defendant can make out a twelve-years' statutory title by adverse possession, the plaintiff's possession must be presumed to have continued, and it is not necessary for him to show a possession by acts of ownership within the twelve years. MOHINY MOHUN DAS v. KRISHNO KISHORE DUTT 802

———*Resumption, Suit for—Rent-free lands—Landlord and Tenant.*] In suits for the resumption of lands alleged by the defendant to be lakheraj, the burden of proof is in the first instance on the plaintiff to show that the lands are *mal*. The fact that the defendant is a tenant of the plaintiff's is a matter to be taken into consideration by the Court in determining whether, on the facts of the case, the plaintiff has made out a *primâ facie* case; but unless the Court finds that the plaintiff has made out a *primâ facie* case, judgment should be given for the defendant. *Hurryhur Mukhopadhya* v. *Madhub Chunder Baboo*, 8 B. L. R., 566: 14 Moore's I. A., 153; *Akbar Ali* v. *Bhyea Lall Jha*, I. L. R., 6 Calc., 666; and *Nemay Bundopadhya* v. *Kali Prosunno Ghose*, I. L. R. 6 Calc., 543, cited. BACHARAM MUNDUL v. PEARY MOHUN BANERJEE 813

Oral Evidence. *See* EVIDENCE ACT, 1872, s. 92 528

Order directing an account. *See* APPEAL 773

——— **granting stay of execution.** *See* APPEAL 214

——— **of Privy Council, Transmission of, for Execution** *See* CIVIL PROCEDURE CODE, 1877, s. 610 482

——— **of single Judge of High Court.** *See* APPEAL 482

Ownership. Presumption of. *See* ONUS PROBANDI 802

Owners of Separate Shares in permanently Settled Estate. *See* PARTITION 419

Parol Evidence, Admissibility of. *See* EVIDENCE ACT, 1872, s. 92 ... 528

Parties. *See* BENGAL ACT VIII OF 1869, s. 32 450

———*See* ENHANCEMENT OF RENT, SUIT FOR 864

———*See* HINDU LAW, ALIENATION ... 495

———*See* MISJOINDER 763

———*See* NAWAB NAZIM'S DEBTS' ACT, 1873 704

——— *See* SALE FOR ARREARS OF RENT. 722

———*Appellate Court, Power of—Respondent—Civil Procedure Code*, 1877, *s.* 559—*Limi-*

Parties—*continued.*
tation Act, 1877.] The discretionary power of directing a person to be made a respondent, conferred on the Appellate Court by s. 559 of the Civil Procedure Code, is not limited by any provision in the Limitation Act (Act XV of 1877). MANICKYA MOYEE v. BORODA PROSAD MOOKERJEE 355

——— *Frame of suit—Suit against parties who do not join as plaintiffs.*] *A* and *B*, co-mortgagees, obtained a summary decree under the Registration Act, 1866, s. 53, on the 6th May 1868, in respect of certain property which was again mortgaged by the owner to *C* and *D* in March 1869 *C* and *D*, having also obtained a decree on their mortgage, sold the property in execution of their decree and purchased it themselves in December 1874. *A* not having had the whole of his mortgage debt satisfied instituted a suit on the 13th December 1879 against *C* and *D*, and the representatives of *B* (*B* having meanwhile died, and his representatives not joining in the suit) to enforce his lien against the mortgaged property in the hands of *C* and *D* and to recover the share of the mortgage-debt still due to himself alone. *Quære*—Whether the suit, although one for only a portion of the debt due on the mortgage (*B's* representatives not having joined and claimed the share due to them), was not properly framed assuming it would lie. CALLY NATH BANDOPADHYA v. KOONJO BEHARY SHAHA 651

——— *Suit to set aside Sale for arrears of Revenue—Secretary of State—Civil Procedure Code*, 1877, *ss.* 32, 424.] The Secretary of State is not a necessary party to a suit to set aside a sale for arrears of revenue, but the Government have such interest as would, on their application, entitle them to be made a party Section 424 of the Civil Procedure Code does not preclude a Court from adding the Secretary of State as a necessary party under s. 32 of the Code. BAL MOKOOND LALL v JIBJUDHUN ROY... 271

———, **Intention of.** *See* MORTGAGE... 961

Partition. *See* HINDU LAW, PARTITION ...

——— *Hindu Widow—Revenue paying Estate—Beng. Act VIII of* 1876, *s.* 10.] A Hindu widow who has succeeded to a share in a revenue-paying estate as heir to her deceased husband is not a person having a proprietary interest in an estate for the term of her life only, within the meaning of s. 10, Bengal Act VIII of 1876. Even if she were, a Civil Court would not be debarred from decreeing partition of a revenue-paying estate at her instance if a proper case for the passing of such a decree be made out by her *Jadomoney Dabee* v. *Savodayrosuna Mookerjee*, 1 Boulnois, 120; *Phool Chand Lall* v. *Rughoobuns Sahoy*, 9 W R, 108; *Katama Natchiar* v. *The Rajah of Shivagunga*, 9 Moore's I A, 539; and *Bhagbutti Dabee* v *Chowdhry Bholanath Thakoor*, L. R., 2 I. A., 256, referred to. Principles on which Courts should order partition at the instance of a Hindu widow stated. MOHADRAY KOOER v. HARUK NARAIN 244

Partition—*continued.*

——— *Owners of separate shares in permanently settled estate—Effect of partitum as against Government*] In the year 1226 F. (1819) a fourteen-anna eight-gunda share of a certain mouzah was permanently settled. The remaining one-anna twelve-gunda share was permanently settled in 1861. This share was sold for arrears of Government revenue in 1873, and purchased by the plaintiff, who subsequently applied to the Collector for partition, under the Butwara Act. The Collector refused to partition, upon the ground that the Act was not applicable to the partition of a mouzah held jointly by the proprietors of two separate estates. The plaintiff then brought the present suit, to which he made the Collector a party, to obtain a declaration that he was entitled to have his share separated from the fourteen-anna eight-gunda share by metes and bounds and also for a decree directing a partition of the whole mouzah into two parts *Held*, that so far as the plaintiff on the one hand, and the owners of the fourteen-anna eight-gunda share on the other, were concerned, the mouzah could be partitioned, but that such partition would not be binding upon the Government unless by consent. AJOODHYA PERSAD v. COLLECTOR OF DURBHUNGAH 419

———, **Decree for.** *See* LIMITATION ACT, 1877, ART. 179 568

Patni tenure. *See* SALE FOR ARREARS OF RENT 683

Payment by one Co-sharer for another. *See* CONTRIBUTION, SUIT FOR . .. 377

——— **not certified to Court.** *See* SALE IN EXECUTION OF DECREE. ... 788

——— **of debts, and Maintenance, Provisions for.** *See* MAHOMEDAN LAW, ENDOWMENT 176

——— **out of Court, to one of several joint decree-holders** *See* EXECUTION OF DECREE 831

Penal Code. s. 75. *See* SENTENCE ... 877

——— s. 143. *See* UNLAWFUL ASSEMBLY 639

——— s. 346. *See* WRONGFUL CONFINEMENT 221

——— s. 471 *See* FRAUD ... 53
615 689

Penalty *See* INTEREST

Permanent Tenure *See* LIMITATION ACT, 1877. ART. 139 411

Personal exemption. *See* LIMITATION ACT, 1877, s. 7 663

Petition of appeal, Error in title of. *See* PRACTICE... 629

Plaint *See* PRACTICE 629

Plaint [*Amendment of Plaint—Second Appeal.*] A plaintiff was not allowed to amend his plaint in second appeal. DABSORATHY HURI CHUNDER MOHAPATTRA v. RAMA KRISHNA JANA 526

Plaintiff. *See* BENGAL ACT VIII OF 1869, s. 32... 450

Plaintiffs, Persons not joining as. *See* PARTIES 651

Police Officer, Statements of Witnesses to. *See* EVIDENCE 455

Ports Act, 1875, s. 22. *See* MASTER AND SERVANT 847

Possession—[*Dispossession—Adverse Possession—Presumption—Onus Probandi—Limitation—Joint Owners, Adverse possession between.*] Under the former Limitation Act the cause of action, and under the present law the event from which limitation is declared to run, must have occurred within the prescribed period, and it lies on the plaintiff to show this. Accordingly, where the suit is for possession, and the cause of action is dispossession, the plaintiff is bound to prove possession and dispossession within twelve years. Possession is not necessarily the same thing as actual user. When land has been shown to have been in a condition unfitting it for actual enjoyment in the usual modes, at such a time and under such circumstances that that state naturally would, and probably did, continue till within twelve years before suit, it may properly be *presumed* that it did so continue, and that the previous possession continued also until the contrary is proved. Such a presumption is in no sense a conclusive one. Its bearing upon each particular case must depend upon the circumstances of that case. Many acts which would be clearly adverse, and might amount to dispossession as between a stranger and the true owner of land, would, between joint owners, naturally bear a different construction. MAHOMED ALI KHAN v. KHAJA ABDUL GUNNY 744

——, **Presumption of.** *See* ONUS PROBANDI 802

——, **Question of.** *See* EVIDENCE ACT, s. 35 431

——, **Suit for** *See* CIVIL PROCEDURE CODE, 1859, s. 7. 283

——— *See* LIMITATION ... 423

——— *See* LIMITATION ACT, 1877, ART. 11 230

——— *See* LIMITATION ACT, 1877, ARTS. 139, 144 367

——— *See* ONUS PROBANDI 39, 125, 130, 802

——— *See* RES-JUDICATA. 120

Possession, Suit for—*Sale in execution of decree—Possession, Application for, by auction purchaser—Subsequent suit for possession of land sold in execution of decree—Civil Procedure Code, 1882, s. 14—Limitation Act, 1877, Art. 138.*] In execution of a decree certain land belonging to the judgment-debtor was sold; subsequently the auction-purchaser, who had not got possession, resold the land to a third party and gave him the certificate. The latter then applied to the Court to be put into possession, but having failed in those proceedings, owing to some irregularity in the description of the boundaries of the property, he instituted a regular suit against the judgment-debtor to obtain possession. On a plea that such suit would not lie as the plaintiff could have got possession in the miscellaneous proceedings, *Held*, that having regard to the provisions of Art. 138 of Schedule II, of Act XV of 1877 and of s. 11 of Act XIV of 1882, such suit was maintainable. SHRU MOHUN BANIA v. BHAGORAN DIN PANDEY 602

——— **by Reversioner.** *See* LIMITATION ACT, 1877, ART. 141 934

——— *See* RES-JUDICATA 463

——— **on dispossession by Landlord** *See* LIMITATION ... 280

——— **Transfer of.** *See* HINDU LAW, GIFT 854

Post Mortem Examination Reports. *See* EVIDENCE 455

Power to Borrow. *See* COMPANY ... 14

Practice *See* CIVIL PROCEDURE CODE 1877, s. 30 604

——— *See* TRANSFER OF CASE 980

———*Civil Procedure Code (Act XIV of 1882), s. 136—Non-compliance with order for production of Documents—Defence struck out.*] Where a defendant neglects to comply with an order for production and inspection, the Court will, although in the last resort, order his defence to be struck out. KHAJAH ASSENOOLLA JOO v. KHAJAH ABDOOL AZIZ ... 923

———*Plaint—Minor—Next friend—Form of plaint—Error in title of petition of appeal.*] A suit was brought by a minor, who appeared by her next friend, and a decree was given in her favour. The defendant appealed, making the next friend alone respondent, and had the decree of the Court of first instance modified in his favour. The next friend appealed to the High Court, where the respondent objected to the next friend being heard, on the ground that she was no party to the suit. *Held*, that the Court would not entertain the objection at the instance of the party through whose fault the error occurred, but that the judgment of the Court below should be set aside, and that of the Court of first instance restored. BHOBOTARINI DEBI v. SREE RAM PAUL 629

Practice—*Right of respondent, who has filed cross objections, to appeal, where appellant withdraws his appeal.*] No leave to appeal should be granted to a respondent who has filed cross objections, unless the Court is thoroughly satisfied upon affidavit that he was ready to appeal, and would have appealed within the proper time if the otherwise had not done so. GOUR HARI SANYAL *v.* PREM NATH SANYAL ... 738

———*Rule nisi to show cause why a person should not be made a party defendant—No grounds stated in or served with the Rule—Rule granted during hearing of suit—Civil Procedure Code (Act XIV of 1882), s. 32.*] During the hearing of a suit for recovery of immovable property it appeared from the evidence and certain documents put in that the plaintiff had mortgaged his right, title and interest to a third person, by whom the suit was practically being carried on. On an application by the defendant for the mortgagee to be added as a party defendant, under the provisions of s. 32 of the Civil Procedure Code, the Court directed a rule to issue calling on him to show cause why he should not be added as a party defendant or give security for costs. The rule was not applied for on petition or affidavit, and set out no grounds for the application at all. On an objection taken by the mortgagee at the hearing of the rule, *Held*, that the grounds should have been stated on affidavit or have appeared on the face of the rule, and that the mortgagee was entitled to know what he had to answer, and consequently, the rule being informal, it was discharged with costs. RAMNARAIN KALLIA *v.* MONKE BIBEE, AND RAMNARAIN KALLIA *v.* GOPAL DOSS SING 735

———**of Mofussil Courts.** *See* EVIDENCE ACT, 1872, s. 35 586

Preliminary point, Disposal of. *See* COSTS 797

Presumption. *See* LANDLORD AND TENANT 252

———*See* POSSESSION ... 744

———**of Payment** *See* MORTGAGE 961

Previous Conviction. *See* SENTENCE 877

Principal and Agent. *See* BENGAL ACT VIII OF 1869, s. 32 ... 450

———*Managing Agent—Authority of Agent—Liability of Principal—Banker and Customer—Bills of Exchange—Indorser and Acceptor.*] *N. & Co.*, the Managing Agents of the Baree Tea Company, had a general banking account with the Oriental Bank Corporation, which account they were allowed to overdraw on having the overdraft properly secured. Under Articles of Association of the Baree Tea Company, *N. & Co.* had power to "draw, accept, endorse, and negotiate on behalf of the Company all such cheques, promissory notes, drafts, &c., as should be necessary

Principal and Agent—*continued.*

for enabling them to carry on the business of the Company." Purporting to act under this power *N. & Co.* drew a bill of exchange on the Managing Agents of the Company, which was accepted by the latter, and endorsed by *N. & Co.* to the Oriental Bank Corporation, who credited the amount to *N. & Co.'s* general account. The amount was drawn out by cheques drawn by *N. & Co.*, personally, without reference to the Baree Tea Company, and there was no proof that the money had been applied for the purposes of the Baree Tea Company. *Held*, in an action by the Oriental Bank against the Baree Tea Company, that the latter were not liable on the bills as acceptors. THE ORIENTAL BANK CORPORATION *v.* THE BAREE TEA COMPANY 880

———*Power-of-Attorney—"Purchase, Sell, Endorse, and Transfer"—Meaning of "Power to Sell"*] *N. & Co.*, having a joint and several power-of-attorney from the plaintiff, authorizing them "to purchase, sell, endorse, and transfer for the plaintiff, and in the plaintiff's name and on the plaintiff's behalf," all shares standing in his name in the books of any public company or society, entered into a contract embodied in bought and sold notes, agreeing to sell by order and on account of *N. & Co.*, to the defendant, twenty-five Muir Mill Cotton shares, and agreeing to buy, by order and for account of *N. & Co.* from the defendant, twenty-five Muir Mill Cotton shares in three months' time at an advanced rate; the bought and sold notes bearing the same date and being one transaction. The transfer deeds were signed by a partner in the firm of *N. & Co.*, as attorney for the plaintiff, and *N. & Co.* received the purchase-money of the shares. Previous to the time fixed for the sale of twenty-five Muir Mill Cotton shares by the defendant to *N. & Co.*, the latter became insolvent. The plaintiff then brought a suit to recover the shares from the defendant *Held* by GARTH, C.J., that, the transaction between *N. & Co.* and the defendant was not justified by the power-of-attorney, the contract not having been entered into "for and on behalf and in the name of the plaintiff" within the meaning of the power. That the transaction was either an actual loan, or a transaction in the nature of a loan, for the purpose of raising money. *Per* WILSON, J., that the defendant took no title to the shares for two reasons, *viz.*: (i) because a power to sell is only a power to sell in the ordinary course of business,—*i.e.*, for a money price; (ii) because it was the duty of the defendant, seeing that the shares were sold to him under a power, to see that he paid the price to the plaintiff or his attorney. JUMMA DASS *v.* ECKFORD 1

———**and Surety**—*Agreement to Mortgage, Assignment of—Bond of Indemnity—Guarantee—Interest.*] Liability of parties discussed and

Principal and Surety—*continued.*
form of decree given in a case where, by an agreement in writing, one of the defendants in consideration of money lent to him by *B*, the other defendant, agreed to execute a mortgage to *B* containing the usual covenants) in default the agreement to stand as a mortgage), and *B* assigned the agreement to the plaintiff, guaranteeing by bond of even date the payment of the principal and interest specified in the agreement. MANICKYA MOYEE *v.* BORODA PROSAD MOOKERJEE 355

Printed form of Contract. *See* CONTRACT 679

Privy Council, Order of, Application for Execution of *See* CIVIL PROCEDURE CODE, 1877, s 610 482

Procedure of High Court. *See* SECOND APPEAL 309

Proclamation of Sale. *See* SALE FOR ARREARS OF RENT 641

Production of documents. Non-compliance with order for. *See* PRACTICE ... 928

Promissory Note *See* CAUSE OF ACTION 105

——— *See* INTEREST ... 689

Property dedicated to Religious purposes. *See* RIGHT OF SUIT 75

——— **Protection of** *See* CRIMINAL PROCEDURE CODE, 1872, s. 518 ... 103

——— **sold in Execution of decree, Suit to recover.** *See* MISJOINDER ... 763

Proprietors of estate. Failure to record names of. *See* SALE FOR ARREARS OF REVENUE 591

Protection of Judicial Officers. *See* LIABILITY OF PUBLIC SERVANT ... 341

Provisions for payment of debts and maintenance. *See* MAHOMEDAN LAW ENDOWMENT 176

Public Servant. *See* LIABILITY OF PUBLIC SERVANT 341

Publication of notice of Sale. *See* SALE FOR ARREARS OF RENT ... 172, 619, 931

——— *See* SALE IN EXECUTION OF DECREE 658

Purchase from Hindu Widow. *See* HINDU LAW, PARTITION 580

Purchaser, Evidence of title of. *See* SALE IN EXECUTION OF DECREE ... 842

——— **Right of.** *See* SALE IN EXECUTION OF DECREE 217

Question relating to the Execution of decree. *See* CIVIL PROCEDURE CODE, 1882, s. 244, cl. (c) 872

Ratification. *See* COMPANY ... 14

Ratification *See* HINDU LAW, WIDOW ... 463

Readiness and Willingness. *See* GOVERNMENT SECURITIES, CONTRACT FOR SALE OF 791

Recorded proprietors. *See* SALE FOR ARREARS OF REVENUE 591

Redemption, Suit for *See* LIMITATION ACT, 1871, ART. 148 616

Reference to High Court. *See* REVISION 847

Refreshing Memory, *See* EVIDENCE ... 455

Refusal to Execute deed. *See* REGISTRATION ACT 1877, ss. 74, 77 ... 851

——— **produce document.** *See* EVIDENCE TAKEN ON COMMISSION ... 939

——— **transmit order of Privy Council for Execution.** *See* LETTERS PATENT, cl. 15 482

Register, Entry in. *See* EVIDENCE ACT, s. 35 431

Registered Owner. *See* LANDLORD AND TENANT 517

Registration. *See* DECREE, SALE OF ... 839

——— **of names.** *See* JURISDICTION OF REVENUE COURTS 925

——— **tenure.** *See* Evidence... 116

——— **Suit to compel.** *See* RIGHT OF SUIT 150

——— **Act 1864, s. 13.** *See* REGISTRATION ACT, 1877, s. 17 68

——— **1866, s. 53.** *See* MORTGAGE 651

——— (VIII OF 1871, s. 17)—*Sale-Certificates, Registration of—Civil Procedure Code, 1859, s. 259—Maxim "Optimus legis interpres consuetudo."*] Sale-certificates granted under the provisions of s 259 of Act VIII of 1859 are not documents, the registration of which is compulsory under the provisions of s. 17 of the Registration Act of 1871. PROKASH CHUNDER DASS *v.* TARACHAND DASS 82

——— (III OF 1877), s. 17—*Admissibility of Evidence—Act XVI of 1864, s. 13.*] Neither s. 17 of Act III of 1877, nor the similar sections of the preceding Acts, have the effect of rendering a document, which was not compulsorily registrable under Act XVI of 1864, inadmissible in evidence, under the succeeding Acts, without registration. RAM COOMAR SINGH *v.* KISHARI 68

——— *Lease or agreement to lease.*] In a suit for possession of certain property and for the execution of a pottah, it appeared that two of the defendants had executed an agreement which was duly registered, by which they acknowledged the receipt of a portion of the *salami*, and covenanted to execute a pottah on a certain day,

Registration Act—*continued.*
This agreement was afterwards confirmed by two of the defendants who were minors when it was entered into: the confirmation was by deed which was duly registered. Subsequently all the defendants executed a document, which provided for the payment of a portion of the *salami* on the day when possession should be given as provided in the first agreement, and for the payment of the remainder by instalments which were to carry interest. This document was not registered. *Held*, that it was not a "lease or agreement to lease" within the meaning of s. 17 of the Registration Act, and was admissible in evidence. KEDARNATH MITTER *v.* SURENDRO DEB ROY ... 865

——————————s. 49—*Unregistered bond—Evidence, Admissibility of—Mortgage bond.*] An unregistered bond, containing a personal undertaking to repay money borrowed, and also a hypothecation of land above Rs. 100 in value as security, may be used in evidence to enforce the personal obligation ULFATUNNISSA *alias* ELAHIJAN BIBI *v.* HOSAIN KHAN 520

——————————1877, ss. 73, 77. *See* RIGHT OF SUIT 150

——————————ss. 74, 77—*Refusal to execute deed—Suit to compel registration.*] If the non-registration of a deed has resulted from the refusal of one of the parties to it to execute it, that matter must be enquired into by the Registrar, as directed by s. 74 of the Registration Act, before any right to sue under s. 77 can arise, and unless the requirements of the Act have been complied with, no cause of action arises under s. 77. *Ejiun* v. *Mahomed Siddik, ante* p. 150, followed. LAKHIMONI CHOWDHRAIN *v.* AKROOMONI CHOWDHRAIN 851

Regulation XVII OF 1806, s. 8. *See* MORTGAGE 643

——————XXIX OF 1814. *See* JAGHIR 187

——————VIII OF 1819, s. 8 *See* SALE FOR ARREARS OF RENT, ss. 172, 619 ... 931

Re-hearing, Discretion of Court as to. *See* REVIEW 209

Relinquishment, Notice of. *See* LANDLORD AND TENANT 671

Rent, Acceptance of. *See* LANDLORD AND TENANT 843

Rent, Execution of decree for. *See* SUPERINTENDENCE OF HIGH COURT ... 295

——**Non-payment of.** *See* RIGHT OF OCCUPANCY 304

——**Payment of, after suit but before decree.** *See* BENGAL ACT VIII of 1869, s. 52 88

——**Suit for.** *See* CIVIL PROCEDURE CODE, 1882, ss. 42, 43 919

Rent, Suit for *See* LANDLORD AND TENANT, s. 72 517

——————*See* NAWAB NAZIM'S DEBTS' ACT 914

——————*See* ROAD CESS ACT, 1871, ss. 5, 7 62

Rent free lands. *See* ONUS PROBANDI .. 813

——**Suit, Intervenor in.** *See* ESTOPPEL 285

Repeal, Effect of. *See* APPEAL IN CRIMINAL CASE 513

——————*See* LIMITATION ACT, 1887, ART. 179 644

Res judicata—*Application for Execution of decree—Decision that Execution is barred by limitation.*] When a Court, upon an application for execution, has decided that the execution is barred by limitation, and that order has become final in consequence of no appeal having been preferred therefrom, such order will, upon a subsequent application for execution of the same decree, operate as a bar to execution. BANDEY KARIM *v.* ROMESH CHUNDER BUNDOPADHYA 65

——————*(Civil Procedure Code, Act X of 1887, s. 13—Competent Court.*] The decision of a Court, in order to be conclusive in another Court, must have been that of a Court which would have had jurisdiction to decide the question raised in the subsequent suit in which the decision is given in evidence as conclusive. The words "Court of competent jurisdiction," used in s. 13 of the Code of Civil Procedure, include the meaning that the first Court must not have been precluded by the pecuniary limit of its jurisdiction from deciding the question raised in the other. The two Courts must exercise such concurrent jurisdiction in regard to the pecuniary limit of their powers that the subject-matter of the second suit would not have been beyond the powers of the Court which disposed of the prior one. The defence made to a suit on a bond for Rs. 12,000 and interest thereon, in a Court having no pecuniary limit of jurisdiction, was that in a prior suit for Rs. 1,665, balance of interest, brought in a Court with power to try suits not exceeding Rs. 5,000 in value, the principal sum due on that bond had been decided to be Rs. 4,790. *Held*, that the issue as to the amount of principal due on the bond had not been heard, and finally decided by a Court of competent jurisdiction within the meaning of s. 13. MISIR RAGHO BARDIAL *v.* SHEO BAKSH SINGH... 439

——————*Civil Procedure Code (Act VIII of 1859, s. 246; and Civil Procedure Code Act X of 1877, ss 271-97)—Dismissal of suit on failure to pay costs of summons*] The defendants attached certain property, which the plaintiffs alleged belong to them. The plaintiffs preferred a claim to the property under s. 246 of Act VIII of 1859; this claim

Res judicata—*continued.*
was disallowed on the 15th August 1877. In June 1878, the plaintiffs brought a suit to establish their title to the property attached, and for confirmation of possession. Pending this suit, the principal defendant died, and the plaintiffs applied for an order to substitute certain persons as defendants. The Court thereupon directed the issue of a summons on the defendants proposed by the plaintiffs to appear and defend the suit; but the plaintiffs failing to pay the costs of the service of this summons, the suit was dismissed on the 14th March 1879. On the 4th March 1880, the plaintiffs again brought a suit to establish their title to the same property and for confirmation of possession. *Held*, that as the first suit had not been dismissed on the merits the plaintiffs were entitled to maintain the second suit. BISSESSUR BHUGUT *v.* MURLI SAHEB ... 163

———*Suit against remote Reversioner—Subsequent suit for possession by Reversioner.*] A Hindu widow and her son, the then presumptive heir to property claimed by the widow, obtained a decree against a more remote reversionary heir. The son predeceased his mother, and the person against whom the decree had been obtained became the next reversionary heir. *Held*, in a suit for possession by him, that the decree in the previous suit did not operate as a *res judicata*. RAM CHUNDER PODDAR *v.* HARI DAS SEN 463

———*Suit for Maintenance—Agreement as to amount of maintenance—Decree limited to agreed amount.*] An allowance for the maintenance of a younger member of a family was charged upon the inheritance to which the eldest male member alone succeeded. In a suit for such an allowance brought by a younger brother against the elder, who had succeeded their deceased father in the possession of the estate, *held* that an order made dismissing a claim for maintenance preferred by such younger brother against their father in his life-time, founded on an ekrarnama, did not afford a defence under s. 13 of the Code of Civil Procedure. *Held*, also, that the brothers having made an agreement, fixing the allowance for maintenance at a certain sum, the younger brother agreeing to receive a less sum for a defined period, he could only obtain a decree for the allowance so reduced. AHMAD HOSSEIN KHAN *v.* NIHALUDDIN KHAN ... 945

———*Suit for Possession—Co-Defendants—Civil Procedure Code (Act X of 1877), s. 13.*] *A* leased lands to *B*, who sued *C* for possession of a certain mauza, alleging it to be a portion of the lands leased. *A* was made a defendant and supported the case of the plaintiff, who obtained a decree. *C* appealed, making *A* and *B* respondents, when the decree was reversed and the suit dismissed, on the ground that the mauza sued for was the property of *C*, and that ruling was upheld on special appeal to the High Court. Subsequently *A* brought a suit against *C* for the same mauza, making *B* a defendant. *Held*, that the title to the mauza was *res judicata* between *A* and *C*, and that the suit would not lie. *Govind Chunder Koondoo* v. *Taruck Chunder Rose*, I. L. R., 3 Calc., 146. BISSORUP GOSSAMY v. GORACHAND GOSSAMY 120

———*Suit for rent dismissed for non-appearance—Subsequent suit for possession—Civil Procedure Code (Act X of 1877) s. 13.*] In 1870 two plots of land, numbered 155 and 147, belonging to the same owner, were sold in execution of a decree. The purchaser of plot 155 sold it to *A*, who in 1873 sued the tenant of a portion of the land for rent. In this suit *A* prayed that it might be declared that he was the owner. The tenant alleged that *B*, the purchaser of plot 147, was the owner of the land in respect of which rent was sought to be recovered, and *B* was made a party to the suit. At the hearing *A* did not appear and the suit was dismissed for default. Subsequently *A* sold plot 155 to the present plaintiff, who now sued for possession *Held*, that the suit was not barred as *res-judicata*. GOBIND CHUNDER ADDDYA *v.* ABZUL RABDANI ... 426

———*Suit for road cess under Rs. 100—Subsequent suit for amount of cess over Rs. 100.*] The decision of a District Judge deciding that the plaintiff is not entitled to sue in a suit for Road Cess where the amount claimed is less than Rs. 100, and therefore, no second appeal lies to the High Court, is a bar to a second suit in which the amount claimed is above Rs. 100. DAVID *v.* GREEN CHUNDER GUHA 188

Respondent. *See* PARTIES 388

———— **who has filed cross objections. Right of when appeal is withdrawn.** *See* PRACTICE 738

Resumption, Suit for. *See* ONUS PROBANDI 813

Revenue, Payment of, by one Co-sharer. *See* CONTRIBUTION, SUIT FOR .. 371

———**-paying Estate.** *See* PARTITION 244

Reversioner. *See* HINDU LAW, REVERSIONER 817

———— *See* HINDU LAW, WIDOW 463

———— **Suit by, for possession.** *See* LIMITATION ACT, 1877, ART. 141... 934

Review—*Civil Procedure Code*, 1877, s. 630—*Review granted on particular ground—Discretion of Court as to Rehearing.*] Where a review of judgment is granted on a particular ground, the Court is not bound to rehear the whole case under s. 630 of the Civil Procedure Code: it is in the discretion of the Court to rehear the whole case, or only the particular point on

Review—*continued.*
which the review has been granted. HARBANS SAHYE *v.* THAKOOR PURSHAD 209

——— **of award.** *See* ARBITRATION ... 575

Revision. *See* JURISDICTION ... 288

———*Criminal Procedure Code, 1882, ss. 408—Jurisdiction of High Court.*] On the 9th December 1882, a person was convicted under ss 457 and 109 of the Penal Code, and sentenced to three years' rigorous imprisonment by a Deputy Magistrate in Assam, exercising special powers under s. 36 of the old Code of Criminal Procedure, Act X of 1872. The new Code came into force on the 1st January 1883. The prisoner presented an appeal to the High Court from the conviction and sentence abovementioned on the 23rd January 1883. *Held*, that there was no appeal, the case being governed by s 408 of the new Code, but that the case was a fit one for the exercise of the High Court's Revisional Jurisdiction, and should be dealt with under the powers conferred on the High Court by virtue of that jurisdiction. RONGAI *v.* THE EMPRESS 518

———*Reference to High Court—Alteration of conviction from one section to another, Necessity for*]. The necessity for altering a conviction from one section to another for cognate offences, when the accused has not been prejudiced by any such error, is no sufficient ground for a reference to the Court of Revision. EMPRESS *v.* ISHAN CHUNDRA DE 847

Right of occupancy. *See* LANDLORD AND TENANT 808

———*Assam—Act X of 1859—Ejectment, Suit for.*] *Per* MITTER and WHITE, JJ (MACPHERSON, J, dissenting). Act X of 1859 does not apply to lands situated in the Assam valley district In a suit brought to eject a tenant of certain land situated in Assam on the ground that he was a trespasser, where it was shown that he had held the land direct from the Government for a considerable time, and that the land had been made over during his tenancy to the plaintiff in exchange for certain other lands made over to the Government, and where the tenant claimed to have acquired a right of occupancy under Act X of 1859, and not to be liable to ejectment in the manner sought for. *Held, per* MITTER and WHITE JJ, that as the Act did not apply to lands situated in Assam, no such right could be claimed, and the suit being properly framed, the plaintiff was entitled to the relief he asked for PRASIDHA NARAYAN KOER *v.* MAN KOCH 330

———**Conditions necessary for acquiring**—*Non-payment of Rent—Beng. Act VIII of 1869, ss. 6, 22 and 52.*] Two conditions only are necessary for the acquiring of a right of occupancy, *viz.* (1), the cultivation or holding of land for a period of twelve years, and (2), that the person holding or cultivating the land should be a ryot. The essential conditions of s. 6, Beng. Act VIII of 1869, are fulfilled without showing the payment of rent, that only being a condition necessary for the maintaining of the right when created. In a suit brought to evict a tenant who had been in possession of certain land for a longer period than twelve years, when it was shown that rent had not been paid, and notice to quit had been given—*Held*, that a right of occupancy had been acquired, and that the ryot had the power to prevent forfeiture under the provisions of s 52, Beng. Act VIII of 1869. NARAIN ROY *v.* OPNITH MISSER 304

———*Ejectment—Transfer—Effect of asserting a right to transfer land, by a ryot having a right of occupancy, who remains in possession*] A ryot having a right of occupancy is not liable to ejectment by his superior landlord merely because he has asserted a transferable right in the lands, and sold that right to a stranger without giving up possession of the land. *Narendra Narain Roy Chowdhry* v. *Ishan Chundra Sen*, 13 B. L. R., 274. S. C. 22 W. R 22; and *Ram Chandra Roy Chowdhry* v. *Bholanath Lusker*, 22 W. R. 200, distinguished; *Dwa ka Nath Misser* v. *Hurrish Chandra*, I. L R., 4 Calc. 925, referred to. SRISHTEEDHUR BISWAS *v.* MUDAN SIRDAR 648

Right of Suit. *See* ACT XX OF 1863, s 14 133

———*See* LIMITATION ACT 1877, s. 7 663

———*See* SALE IN EXECUTION OF DECREE 788

———*Attachment—Execution of Decree—Claim to Attached Property—Cause of Action—Civil Procedure Code (Act VIII of 1859), ss 246, 247.*] Where a person whose property has been attached in execution of a decree against another person, and whose claim under s. 246 of Act VIII of 1859 has been rejected, brings a suit under the provisions of s 247 of Act VIII of 1859, it is no objection to that suit that, previously to the filing thereof, the decree (in execution of which the property had been attached) was satisfied by the judgment-debtor and the property released from attachment. SREEPUTTY MIRDHA *v.* KARTICK SINGHA 10

———*Injunction—Property dedicated to Religious purposes—Suit to restrain its use for other purposes.*] The plaintiff's ancestor built a temple, a bathing-ghat, a room called 'Gangajatri ghur,' and a ghat close to it, to which persons on the point of death were removed, and certain ceremonies were performed. The defendants used the last men-

Right of suit—*continued.*
tioned ghat for the purpose of landing goods. *Held*, that if, when the plaintiff's ancestor erected the buildings, he intended to grant to the Hindu community merely a right of easement over the property, and not to transfer the ownership therein to the community, the plaintiff was entitled to maintain a suit to restrain defendants from using the ghat for trading purposes. JAGGAMONI DASI *v.* NILMONI GHOSAL 75

———*Suit to compel registration—Registration Act (III of 1877), ss. 73, 77.*] Under the Registration Act of 1877, a suit to compel registration is maintainable only when the provisions of s. 77 of the Act have been complied with. A person omitting to make an application to the Registrar as provided by s. 73, within the time provided by s. 72, cannot be said to have complied with the conditions precedent to a suit under s. 77. Independently of s. 77 of the Act no suit will lie. *Bhagwan Singh* v. *Khuda Buksh*, I. L. R., 3 All., 397 followed; and *Ram Ghulam* v. *Chotey Lal*, I. L. R., 2 All., 46 dissented from. EDUN *v.* MAHOMED SIDDIK 150

——— **Way**—*Extent of user—Purpose for which right claimed is strictly identical with original purpose contemplated at commencement of right.*] Where a right of way for a particular purpose is proved to have existed for upwards of 20 years the Court is not bound to confine the right to the precise number of times in the year that it has been exercised, but may construe it *as a right to use the road at all convenient times for the particular purpose.* GOPAL CHUNDER MUKERJEE *v.* JUDOO LALL MULLICK 778

——— **to execute Decree.** *See* DECREE, SALE OF 839

——— **to Redeem.** *See* MORTGAGE ... 642

——— **to sue for Damages.** *See* SALE IN EXECUTION OF DECREE 695

Road Cess Act *(Bengal Act X of 1871)—Interest in Land—Jalkar.*] A jalkar does not impart any interest in the soil itself, and therefore a patni of a jalkar is not 'an interest in land' within the meaning of the definition in the District Road Cess Act. DAVID *v.* GREEN CHUNDER GUHA 188

ss. 5, 7—Bhowli Tenures—Suit for Rent.] Section 5 of the Road Cess Act requires the holders of any estate or tenure, of which the annual rent shall exceed one hundred rupees, to lodge returns of all lands comprised in an estate or tenure; bhowli lands are, therefore, to be included in such returns. Where such a return has not been made, the holder of the estate or tenure is precluded from suing for or recovering any rent due therefor. JUGMOHUN TEWARI *v.* FINCH... 62

Rule to show cause why person should not be defendant. *See* PRACTICE ... 785

Sale by Magistrate. *See* ABSCONDING OF ACCUSED 861

Sale for Arrears of Rent. *See* INSOLVENCY 855

———*Bengal Act VIII of 1869, ss. 59, 60—Sale Certificate—Proclamation of Sale—Under Tenure.*] *Held*, on the construction of a sale certificate and a proclamation of sale purporting to be made under ss 59 and 60 of the Rent Act, Bengal Act VIII of 1869, that what passed by the sale was not an under tenure, but merely the right, title, and interest of the judgment-debtor therein. The declaratory portion of a sale proclamation is not by itself sufficient to override the description of the property in the body of the document. DWARKA NATH *v.* ALOKE CHUNDER SEAL 641

———*Landlord and Tenant—Sale of a portion of a Tenure—Bengal Act VIII of 1869, ss 59, 60—Co-sharers—Parties.*] A portion of a tenure cannot be the subject of a sale under s. 64, Bengal Act VIII of 1869, so as to give the purchaser the same privilege as he would acquire by the purchase of an entire tenure under ss 59 and 60. A landlord who was in receipt of a half share of the rent of a certain tenure caused that share of the tenure to be sold in execution of a decree for arrears of rent. After such sale *A*, the purchaser, took possession. Subsequently the tenant executed a mortgage, and a decree being obtained by the mortgagee the whole tenure was brought to sale in execution thereof and purchased by the mortgagee who proceeded to oust *A*. In a suit by *A* to recover possession of his half share of the tenure on the footing of his purchase. *Held*, that he could not make out a title to the half tenure with the privilege attaching to the purchase of an entire tenure under ss 59 and 60 of Bengal Act VIII of 1869, and that as it appeared that the mortgagor, whose rights and interests only were thus sold, was only one of several co-sharers, in the absence of the co-sharers who were not parties to the suit, *A* was not entitled to the relief he sought. G. M. REILY *v.* HUR CHUNDER GHOSE 722

———*Patni tenure—Durpatni tenure—Under tenure—Incumbrance—Bengal Act VIII of 1869, ss 59, 60, 66.*] The sale of a patni tenure for its own arrears under ss 59 and 60, Bengal Act VIII of 1869, does not *per se* avoid the durpatni tenures, but only renders them voidable at the option of the purchaser. An undertenure is an incumbrance within the meaning of s. 66, Bengal Act VIII of 1869. TITU BIBI, MUNSURUNNISSA BIBI, IBRAHIM MALLA *v.* MOHESH CHUNDER BAGCHI 68

Sale for arrears of Rent—*Publication of Notice of Sale—Material Irregularity—Regulation VIII of* 1819, *s.* 8, *cl.* 2.] Clause 2, s. 8 of Regulation VIII of 1819, which provides that a notice of sale under the Regulation shall be stuck up in the cutchery of the zemindar, is not complied with by serving the notice upon the zemindar himself or his agent. The object of the Regulation is to make known to the holders of undertenures and ryots and the residents of the place that the patni will be sold if the arrears are not paid off within the time specified, and if the notice is not stuck up in the cutchery, as prescribed by the Regulation, there is such a material irregularity in the publication as will avoid the sale GOBIND LALL SEAL *v.* CHANDHURRY MAITY 172

——————*Regulation VIII of* 1819, *s.* 8, *cl.* 2—*Proof of publication of notice before sale of patni taluk for arrears of rent.*] The due publication of the notices prescribed by Regulation VIII of 1819, s 8, cl. 2, forms an essential part of the foundation on which the summary power to sell a patni taluk for non-payment of rent is exercised by the zemindar who, when instituting this proceeding, is exclusively responsible for such publication being regularly conducted. Although objection to the form of the receipt, and the absence of the receipt itself, need not be regarded, if the fact of the due publication of the notices having been made is not a matter of controversy (as held in *Sona Beebee* v. *Lalchand Chowdhry*, 9 W. R, 242,) yet where that fact was in doubt owing to the evidence of it not having been secured according to the provisions of the Regulation—a result due to the neglect of those representing the zemindar—the finding of the High Court that due publication had not been established by such proofs as were forthcoming, was maintained by the Judicial Committee. MAHARAJAH OF BURDWAN *v.* JAGASUNDARI DEBI 619

——————*Regulation VIII of* 1819, *s.* 8—*Due publication of Notice of Sale.*] Where there is a cutchery upon the land of a defaulting patnidar the notice required by s. 8 of Regulation VIII of 1819 must be served there; but where there is no such cutchery, the notice should be published in the manner required by the section, at the principal town or village within the taluk. THE MAHARAJAH OF BURDWAN *v.* KRISTO KAMINI DASI 931

——————**Revenue**—*Revenue-paying estate—Sale of share of an estate—Recorded Proprietors—Omission of names of Proprietors—Irregularity—Act XI of* 1859, *ss.* 6, 33.] When a notification of sale of a share in a revenue-paying estate is issued under s. 6, Act XI of 1859, the circumstances that such notification does not contain the names of all the recorded

Sale for Arrears of Revenue—*continued*

proprietors of the share, but only the name of one of them, does not amount to an irregularity within the meaning of s. 33, Act XI of 1859. THE SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* RASHEEHARY MOOKERJEE ... 591

——————*Suit to set aside sale—Act XI of* 1859, *ss.* 6, 20, 35—*Bengal Act VII of* 1868, *s.* 8—*Certificate of title.*] A notification by the Collector under s. 6 of Act XI of 1859, fixing the 31st May 1879 as the date for holding the sale, was affixed in the places mentioned in the section on the 2nd May 1879. Subsequently the 31st May being ascertained to be a holiday, and the 1st June being a Sunday, the Collector, purporting to act under s. 20 of the Act, issued a notification on the 26th May, postponing the sale till the 2nd June. On that day the sale was held, and the Commissioner having upheld it on appeal, a certificate of title was given to the purchaser. *Held*, in a suit to set aside the sale, that inasmuch as the notification under s. 6 of the Act had not been affixed thirty days before the day fixed by it for holding the same, the requirements of that section had not been fulfilled, and the irregularity was not cured by the notification of the 26th May. *Held*, further, that the Court was not bound under s 8 of Bengal Act VII of 1868 to presume conclusively that the provisions of s 6 of Act XI of 1859, as regards the fixing of the date of sale, had been complied with. Under s 8 of Bengal Act VII of 1868 the effect of a certificate of title having been given to the purchaser is merely that the Court is bound to presume conclusively the due service and posting of notices. BAL MOKOOND LALL *v.* JIBUDHUN ROY 271

——————**Suit to set aside.** *See* PARTIES 271

Sale in Execution of Decree. *See* ESTOPPEL 265

——————*See* ABSCONDING OF ACCUSED 861

——————*See* HINDU LAW, ALIENATION ... 389, 452, 495

——————*See* POSSESSION, SUIT FOR 602

——————*Attachment—Shikmi Ghatwali Tenure*] A shikmi ghatwali tenure, held under the superior ghatwal, is not liable to be sold in execution, nor are its proceeds liable to attachment for satisfaction of the debt due from its holder. BALLY DOBEY *v.* GANEI DEO 388

——————*Civil Procedure Code (Act X of* 1877), *s* 295—*Rateable distribution amongst decree-holders*] Where property belonging to *A* has been attached under a decree, and other decree-holders than

Sale in Execution of Decree—*continued.*
the attaching creditor have applied before realization of assets to participate in the sale proceeds, and amongst them a creditor who has obtained a decree against *A* and *B*, such latter creditor is entitled under s 295 to share in the proceeds of the sale of *A's* property. SUMBHOO NATH PODDAR v. LUCKYNATH DEY ... 920

——————*Civil Procedure Code (Act X of 1877), s. 311—Irregularity in publication of intended sale.*] An objection to the validity of a sale of revenue-paying land, on the ground that the revenue assessed upon it had not been stated in the proclamation of the intended sale, in accordance with s. 287 of Act X of 1877, was taken, for the first time, in the Court of appeal; an application to set aside the sale, on the ground that it had taken place without proclamation made, having been rejected by the Court of the first instance, which found that proclamation had been made. *Held*, that the objection was taken too late, although if properly taken in the Court of first instance, it would have been good to the extent that not stating the amount of the revenue was an irregularity; substantial damage, resulting from it, remaining to be proved, as required by s. 311 of Act X of 1877 *Held*, also, that inadequacy of price having been alleged as substantial damage, without having been proved to be the effect of the nonstatement of the revenue, the applicant had not (as required by s. 311) proved, to the satisfaction of the Court, that he had sustained substantial damage by reason of such irregularity. MACNAGHTEN v. MAHABIR PERSHAD SINGH 656

——————*Civil Procedure Code (Act XIV of 1882, s 313.*] Section 313 of the Civil Procedure Code only applies to cases in which the judgment-debtor has no saleable interest in the property sold. It does not apply to cases where the judgment-debtor has no saleable interest in a portion only of the property. IN THE MATTER OF THE PETITION OF RAM COOMAR DEY. RAM COOMAR DEY v. SHUSHEE BHOOSHUN GHOSE ... 626

——————*Debt secured by mortgage of immovable property—Civil Procedure Code (X of 1877), s. 266.*] A debt secured by mortgage of immovable property cannot be sold in execution of a decree under the provisions of the Civil Procedure Code applicable to moveable property. SRINATH DUTT v. GOPAL CHUNDER MITTRA 511

——————*Decree against Insolvent—Official Assignee, Assent of to sale—Purchaser, Right of—Setting aside Sale—Code of Civil Procedure (Act X of 1877), s. 313.*] Where in execution of a decree passed against a person who had previously been adjudicated an insolvent, portions of his property (then vested in the Official Assignee) are attached and sold, the

Sale in Execution of Decree—*continued.*
purchaser is entitled to have the sale set aside under s 313 of the Code of Civil Procedure, notwithstanding that the Official Assignee acquiesces in the sale, and is content to receive the sale-proceeds. DINOBUNDHOO PAL v. SHOSHEE MOHUN PAL 217

——————*Direction in will for payment of debts—Decree against heirs for debt of Ancestor—Charge on property.*] A testator by his will directed payment of all his debts, and subject thereto devised his property to his heirs. After one of the testator's creditors had obtained a decree against the heirs in their representative capacity, which by its terms was to be satisfied out of the assets left by the testator, one of the heirs mortgaged his share in twelve properties left by the testator. Subsequently to the mortgage one of the mortgaged properties was sold in execution of the creditor's decree. The mortgagee afterwards brought a suit against the mortgagor and obtained a decree on his mortgage. *Held*, that as neither the direction in the will for payment of debts nor the decree in the creditor's suit created a charge on the property of the testator, the property sold in execution of the creditor's decree had been sold subject to the mortgage, and the mortgagee was entitled to execute his decree against that property. *Bazayet Hussein v. Dudh Chand*, I. L. R, 4 Calc., 402, distinguished. RAM DHUN DHUR v. MOHESH CHUNDER CHOWDHRY ... 406

——————*Irregularity—Substantial Injury—Civil Procedure Code (Act X of 1877), s. 293.*] At a sale in execution of a decree the property was knocked down to a bidder at Rs. 260. The bidder was unable to make a deposit, and the property was immediately put up for sale and re-sold for Rs. 50. *Held*, that the judgment-debtor had sustained such substantial injury as would justify the Court in setting aside the sale, notwithstanding that the judgment-debtor might, under s 293 of the Civil Procedure Code, have sued to recover the difference between the original bid and the price at which the property was sold. BEEPEN CHUNDER SHIKDAR v. PURRESH NATH BISWAS 98

——————*Payment not certified to Court—Fraud—Setting aside Sale—Cause of action—Right of suit.*] *A* obtained a money decree against *B* and others jointly for Rs 112; and in consideration of a payment of Rs 25 made by *B* agreed to release *B* from all liability under the decree. This payment was not certified to the Court, and *A* afterwards in execution of the decree had certain immovable property belonging to *B* put up for sale, and this property he purchased himself. *Held*, that a suit would lie by *B* to set aside the sale and to recover the property from *A*. ISHAN CHUNDER BANDOPADHYA v. INDRONARAIN GOSSAMI. 788

Sale in Execution of Decree—*Right to sue for damages—Mesne profits—Civil Procedure Code* (1877), *s* 266, *cl* (*e*.)] The right to sue for mesne profits is a "right to sue for damages" within the meaning of s. 266, cl. (*e*) of the Code of Civil Procedure, and therefore cannot be sold in execution of decree Where, therefore, the plaintiff purchased the right to sue for mesne profits at a sale in execution of a decree. *Held*, that a suit by him to enforce the right was not maintainable. SHYAM CHAND KOONDOO *v.* THE LAND MORTGAGE BANK OF INDIA, LIMITED 695

——— *Sale of immovable property—Confirmation of sale—Sale certificate—Evidence of Title of Purchaser*] The order confirming a sale of immovable property in execution of a decree is sufficient to pass the title in the property to the purchaser, and its production is sufficient evidence of the purchaser's title. The production of the sale certificate is not essential. *Doorga Narain Sen* v. *Banny Madhub Mozoomdar*, I. L. R., 7 Calc, 199, followed. TARA PRASAD MYTEE *v.* NUND KISHORE GIREE 842

——— *Setting aside sale—"Saleable Interest"—Civil Procedure Code* (*Act XIV of* 1882) *s* 313.] The fact that property sold in execution of a decree is subject to a mortgage upon which a decree has been obtained, which fact is not disclosed prior to the proclamation of sale, is not sufficient to enable an auction-purchaser to set aside the sale on the ground that the judgment-debtor had "no saleable interest" in the property, within the meaning of s 313 of the Civil Procedure Code *Nahormul Marwari* v *Sadut Ali*, 8 C. L. R., 468, distinguished. PROTAP CHUNDER CHUCKERBUTTY *v* PANIOTY 506

Sale of Goods *See* CONTRACT ... 473

Sale of Goods to arrive. *See* CONTRACT 679

Sale Certificate. *See* REGISTRATION ACT, 1871, s. 17 82

Saleable Interest. *See* SALE IN EXECUTION OF DECREE 506

Satisfaction of decree certified to Court. *See* EXECUTION OF DECREE ... 831

Scheme for satisfying decree. *See* CIVIL PROCEDURE CODE, 1877, s. 326 ... 290

Sebait. *See* HINDU LAW, ENDORSEMENT 766

Second Appeal. *See* LAND ACQUISITION ACT, ss. 15 AND 39 838

——— *Findings of fact—Procedure of the High Court—Interest—Mortgage bond.*] Where the lower Appellate Court has clearly misapprehended what the evidence before it was, and has thus been led to discard or not give sufficient weight to important evidence, and to give weight to other evidence to which it is not entitled, and has thus been led not into any

Second Appeal—*continued.*

mere incidental mistake, but totally to misconceive the case, the High Court will interfere in second appeal, though it is not the ordinary course of procedure for it to interfere in such cases with any findings of fact which have been arrived at by the lower Appellate Court. In a suit on a mortgage bond the, plaintiffs are entitled to recover the agreed rate of interest without any deduction. FUTTEHMA BEGUM *v.* MOHAMED AUSUR 809

——— **Changing case in.** *See* PLAINT 526

Secretary of State. *See* PARTIES ... 271

Security for good behaviour. *See* APPEAL IN CRIMINAL CASE 878

——— *Code of Criminal Procedure* (*Act X of* 1872), *ss.* 504, 505.] An accused person was convicted of theft and sentenced to two years' rigorous imprisonment, and was further ordered to enter into his own recognizances for Rs 50 and find two sureties, each for a like sum, for his good behaviour for one year after the term of his imprisonment had expired; in default to suffer rigorous imprisonment for one year *Held*, that the latter part of the order was bad, and that the Magistrate should have proceeded under the provisions of s. 504, cl. 2, of the Code of Criminal Procedure. *The Empress* v. *Partab*, I. L. R., 1 All., 666, followed. TAMIZ MANDAL *v* UMID KARIGAR 215

Sentence—*Penal Code* (*Act XLV of* 1860), *s.* 75—*Previous Conviction*] The object of s. 75 of the Indian Penal Code is to provide for an additional sentence, not a less severe sentence, on a second conviction. Recourse should not be had to that section if the punishment for the offence committed is itself sufficient. SHEO SARAN TATO *v.* THE EMPRESS ... 877

Separate Suit. *See* CIVIL PROCEDURE CODE, 1882, s. 244, cl. (c) 872

Separation of Member of Family. *See* HINDU LAW, JOINT FAMILY ... 817

Servant, Criminal act of. *See* MASTER AND SERVANT 849

——— **of Licensed Vendor, Sale of Liquor by** *See* BENGAL EXCISE ACT, 1878, *ss.* 53, 60, 61 847

Service of Summons—*Service on Agent—Suit to obtain relief respecting immovable property—Civil Procedure Code* (*Act XIV of* 1882), *s.* 16] In a suit for foreclosure or sale of immovable property, it appeared that the mortgagee had conveyed the mortgaged premises to trustees. The summons to one of the trustees was personally served upon his duly constituted agent, who was at the time of service in charge of the mortgaged premises. *Held*, that the service was sufficient, the suit being

Service of Summons—*continued.*
one to obtain "relief respecting immovable property" within the meaning of s. 16 of Act XIV of 1882. MICHAEL *v* AMEENA BIBI ... 733

Sessions Judge, Duties of. *See* CRIMINAL PROCEDURE CODE, 1882, s 309 ... 875

Set-off—*Cross decrees—Civil Procedure Code (Act X of 1877), s. 246.*] A judgment-debtor may set off against the amount of the decree against him, the amount of a decree which he has obtained against the decree-holder and other persons. HURRY DOYAL GUHO *v.* DIN DOYAL GUHO 479

Settlement containing Clause for Re-entry. *See* LANDLORD AND TENANT 908

Sister. *See* HINDU LAW, INHERITANCE 725

——— **Succession of Married.** *See* HINDU LAW, INHERITANCE ... 154

Small Cause Court, Mofussil—*Suit for contribution—Money paid in satisfaction of joint decree.*] A suit for contribution for money paid by one judgment-debtor in satisfaction of a joint decree against him and others cannot be entertained by a Court of Small Causes. *Rambur Chittanjee* v. *Mudhoosoodun Paul Chowdhry*, B L. R. Sup Vol, 675; 7 W. R. 411; *Shaboo Mayee* v. *Noorai Mollah*, B L R Sup. Vol, 691 followed; *Nath Prasad* v. *Baijnath*, I. L. R., 3 All., 66. dissented from. RAMJOY SURMA *v.* JOYNATH SURMA 395

——————— —*Suit to recover Road and Public Works Cess—(Act XI of 1865), s. 6].* A suit to recover road cess and public works cess is not a claim for money on bond or other contract, but is a claim created and made recoverable by a special enactment to the Legislature, and does not fall within the provisions of s. 6 of the Mofussil Small Cause Court Act. DAVID *v.* GRISH CHUNDER GUHA 188

——————— **Presidency Towns**—*Act IX of 1850, s. 53—Extension of jurisdiction by Act XV of 1882—Abandonment of excess.*] Whilst the pecuniary jurisdiction of the Small Cause Court was limited to Rs. 1,000, the plaintiffs brought a suit for that amount for damages for breach of a certain contract after abandoning the excess, and in that suit they elected a non-suit under s 53, Act IX of 1850 *Held*, in a suit brought in respect of the same damages for the full amount due to them, that the plaintiffs were not precluded by their having abandoned the excess in the former suit, from recovering the full amount sued for SIMPSON *v* GORA CHAND DOSS ... 472

Sovereign Prince. Suit against. *See* JURISDICTION 535

Special Agreement. *See* LIMITATION... 211

——— **Appeal**—*Suit for damages for trespass—Question of title.*] The fact that a tenure

Special appeal—*continued.*
is registered in the Common Registry under Act XI of 1859, s 39, is not of itself *primâ facie* evidence that such a tenure exists In a suit for damages for trespass laid at a sum under Rs. 100, a special appeal will lie to the High Court if the title to the land trespassed upon has been raised in the Courts below. LUKHYNARAIN CHATTOPADHYA *v.* GORACHAND GOSSAMY 116

Specific moveable property. Suit for. *See* LIMITATION ACT, 1877, ARTS. 49 AND 123 79

Splitting claims. *See* CIVIL PROCEDURE CODE, 1877, s 43 143

Stamp Act (I of 1879)—*Stamp-Duty—Hathchitta—Evidence, Admissibility in—Acknowledgment of debt.*] An account in a *hathchitta* showing advances of money made to, and part-payment made by, the defendant, the whole amount being in the handwriting and signed by the defendant, is admissible in evidence without being stamped *Brojendro Coomar* v. *Bromomoyo Chowdhrain*, I. L. R., 4 Calc, 885; 3 C. L. R. 520 followed. BROJO GOBIND SHAHA *v.* GOLUCK CHUNDER SHAHA, *alias* GOLUCK SHAHA 127

Statement in decree. *See* EVIDENCE ACT, 1872, s 35 586

——— **to Police Officer.** *See* EVIDENCE 455

Statute 24 AND 25. VICT. C. 104, ss. 13 AND 15. *See* HIGH COURT'S CRIMINAL PROCEDURE ACT, ss. 14 AND 147 397

——————— s. 15. *See* SUPERINTENDENCE OF HIGH COURT 295

Stay of Execution, Order granting. *See* APPEAL 214

——— **Sale of attached property** *See* CIVIL PROCEDURE CODE, 1877, s. 326 290

Step in aid of Execution. *See* LIMITATION ACT, 1877, ART. 179 844

Stridhan *See* HINDU LAW, INHERITANCE 725

Suberakari Tenures. *See* LANDLORD AND TENANT 526

Substantial Injury. *See* SALE IN EXECUTION OF DECREE 98

Succession to Management of religious Endowment *See* HINDU LAW, ENDOWMENT 766

——— **Act,** s. 50. *See* WILL ... 226

Suit for road cess under Rs 100. *See* RES-JUDICATA 183

——— **to compel registration** *See* REGISTRATION ACT, 1877, ss 74 AND 77 ... 851

———————. *See* RIGHT OF SUIT 150

Suit to establish title to property after rejection of claim *See* LIMITATION ACT 1877 ARTS 11 AND 120 163

——— **obtain relief respecting immovable property.** *See* SERVICE OF SUMMONS 733

——— **recover balance of tahsildar's account after dismissal** *See* LIMITATION 211

——— **money lent** *See* MORTGAGE 234

——— **property sold in Execution of decree** *See* LIMITATION ACT, 1871 ART 15 43

——— *See* MISJOINDER 763

——— **Road and Public Works cess** *See* SMALL CAUSE COURT, MOFUSSIL 183

——— **restrain fishing in certain bhils** *See* LIMITATION ACT 1877 s 26 638

——— **use of property except for particular purpose** *See* RIGHT OF SUIT 75

Summing up evidence by Judge *See* CRIMINAL PROCEDURE CODE 1882, s 309 875

Summons, Non-service of *See* APPEAL 627

Superintendence of High Court—24 *and* 25 *Vic*, *c* 104 *s* 15—*Execution of decrees for rent*—*Act X of* 1859 *ss* 23 77 *and* 160—*Civil Procedure Code* (*Act VIII of* 1859) *ss* 284 294—(*Act X of* 1877) *ss* 223 228] Whether a decree for rent, under Act X of 1859 made in one district can be transferred to another for execution is a question which the High Court can decide in the exercise of its "superintendence over all Courts subject to its appellate jurisdiction under 24 and 25 Vic, c 104 s 15 Decrees for rent made by the Collector under s 23 of Act X of 1859 can be executed by a Civil Court to which they may be transferred under the sections of the Code of Civil Procedure relating to the execution of a decree out of the jurisdiction of the Court by which it was passed " NILMONI SINGH DEO *v* TARANATH MUKERJEE . 295

Surety. *See* PRINCIPAL AND SURETY 355

——— **for payment of rent.** *See* JURISDICTION OF REVENUE COURT 383

Surrender of Lease *See* LANDLORD AND TENANT 671

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——— *See* GOVERNMENT SECURITIES CONTRACT FOR SALE OF . .. 791

——— **of Principal and Interest** *See* DECREE 33

Tenure, Registration of *See* EVIDENCE 116

——— **Sale of portion of** *See* SALE FOR ARREARS OF RENT 722

Time Bargain *See* GOVERNMENT SECURITIES CONTRACT FOR SALE OF 791

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Title *See* BENGAL ACT VIII OF 1869 s 27 428

——— **Claim for declaration of.** *See* LIMITATION 280

——— **Question of** *See* JURISDICTION OF REVENUE COURT 925

——— *See* SPECIAL APPEAL 116

——— **of purchaser, Evidence of** *See* SALE IN EXECUTION OF DECREE 843

Transfer of case—*Civil Procedure Code* (*Act XIV of* 1882) *section* 23—*Practice*—*Ground for transfer*] Section 23 of Act XIV of 1882 is only intended to provide for those cases where on the ground of expense or convenience or some other good reason the Court thinks that the place of trial ought to be changed Part es desirous of obtaining the transfer of a case from one forum to a other ought clearly to explain to the Court by petition and affidavit what is the nature of the claim and defence; they should further state what are the issues and the evidence required and then satisfy the Court that, either on the ground of expense or convenience or otherwise the place of trial ought to be changed KHATEJA BIBEE *v* TARUK CHUNDER DUTT 980

Transfer of possession. *See* HINDU LAW, GIFT 854

——— **Rent-decree for execution** *See* LIMITATION 580

Transferable right *See* RIGHT OF OCCUPANCY 648

Trespass, Suit for damages for *See* SPECIAL APPEAL 116

Trespassers *See* LANDLORD AND TENANT 908

Unconditional Order *See* CRIMINAL PROCEDURE CODE, 1882 s 133 637

Under Tenure *See* SALE FOR ARREARS OF RENT 641 683

Unlawful Assembly—*Penal Code* (*Act XLV of* 1860) *s* 143] On the trial of certain persons charged with being members of an unlawful assembly, it was proved that there was a dispute of long standing between the accused and certain other parties regarding the possession of certain land, that neither of the parties was in undisturbed possession of the land; that the accused went to sow the land with indigo, accompanied by a body of men armed with *lattiee*, that they were prepared to use force, if neces-

Unlawful assembly.—*continued.*
sary; and that the *lattials* kept off the opposite party by brandishing their weapons while the land was sowed. *Held*, that the accused were rightly convicted of being members of an unlawful assembly, under s. 143 of the Penal Code. *Sunkur Singh* v. *Burmah Mahto*, 23 W. R. Cr., 25, distinguished. IN THE MATTER OF PEARY MOHUN SIRCAR, PEARY MOHUN SIRCAR v. THE EMPRESS ... 639

Unpaid vendor. *See* LIEN ... 167

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Use and Occupation. *See* LANDLORD AND TENANT ... 908

User, Extent of. *See* RIGHT OF WAY ... 778

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Verdict of Jury. *See* CRIMINAL PROCEDURE CODE, 1872, s. 263 ... 53

Waiver by acceptance of rent. *See* LANDLORD AND TENANT ... 843

Waste by Hindu Widow. *See* HINDU LAW, REVERSIONER ... 817

Widow. Lands purchased by. *See* HINDU LAW, INHERITANCE ... 758

Widow's Estate. *See* HINDU LAW, PARTITION ... 580

Widow's Estate. *See* HINDU LAW, WIDOW 463

Will—*Attestation of Will—Witnesses—Succession Act* (*X of* 1865), *s.* 50.] Where the testator does not himself sign the will but some other person signs it in his presence and by his direction, then, besides this other person, there must be two witnesses who must sign the will in the presence of the testator. *In the Goods of Roymoney Dassee*, I. L. R., 1 Calc., 15, and *Hurro Sundari Dabia* v. *Chunder Kant Bhattacharjee*, I. L. R., 6 Calc., 17 cited. IN THE MATTER OF THE PETITION OF HEMLOTA DABEE ... 226

—— **Construction of.** *See* HINDU LAW, WILL ... 952

Witnesses. *See* WILL ... 226

Witnessing deed, Effect of. *See* HINDU LAW, WIDOW ... 463

Wrongful Confinement—*Penal Code* (*Act XLV of* 1860), *s.* 346.] In order to render person liable under s. 346 of the Penal Code, it must be shown that the wrongful confinement was of such a nature as to indicate an intention that the person confined should not be discovered. IN THE MATTER OF THE PETITION OF SREENATH BANERJEE ... 221

Wakf. *See* MAHOMEDAN LAW, ENDOWMENT 176

Zemindari, Inclusion of Jaghir lands in area of settled. *See* JAGHIR ... 187

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